No. 06-1463
Title: Arnold M. Preston, Petitioner
v.
Alex E. Ferrer
Docketed: May 7, 2007
Lower Ct: Court of Appeal of California, Second Appellate District
Case Nos.: (B188997)
Decision Date: November 30, 2006
Discretionary Court
Decision Date: February 14, 2007
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
May 4 2007	Petition for a writ of certiorari filed. (Response due June 6, 2007)
May 30 2007	Waiver of right of respondent Alex E. Ferrer to respond filed.
Jun 5 2007	DISTRIBUTED for Conference of June 21, 2007.
Jun 12 2007	Response Requested . (Due July 12, 2007)
Jul 11 2007	Brief of respondent Alex E. Ferrer in opposition filed.
Jul 17 2007	Reply of petitioner Arnold M. Preston filed.
Jul 25 2007	DISTRIBUTED for Conference of September 24, 2007.
Sep 25 2007	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of amici curiae are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.
Nov 1 2007	Joint appendix filed. (Statement of costs received.)
Nov 1 2007	Brief of petitioner Arnold M. Preston filed.
Nov 7 2007	Brief amicus curiae of Pacific Legal Foundation filed.
Nov 8 2007	Brief amicus curiae of Macy's Group Inc. filed.
Nov 8 2007	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Nov 8 2007	Brief amicus curiae of CTIA - The Wireless Association filed.
Nov 16 2007	SET FOR ARGUMENT ON Monday, January 14, 2008.
Nov 21 2007	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the respondent.
Dec 3 2007	Brief of respondent Alex E. Ferrer filed.
Dec 6 2007	CIRCULATED.
Dec 6 2007	Brief amicus curiae of William Morris Agency filed. (Distributed).
Dec 7 2007	Brief amici curiae of Screen Actors Guild, Inc., et al. filed.
Dec 27 2007	Reply of petitioner Arnold M. Preston filed. (Distributed)
Jan 8 2008	Record received from Court of Appeal of California, Second Appellate District. (1 envelope)
Jan 14 2008	Argued. For petitioner: Joseph D. Schleimer, Beverly Hills, Cal. For respondent: G. Eric

	Brunstad, Jr., Hartford, Conn.
Feb 1 2008	Motion for leave to file a supplemental brief after argument filed by respondent.
Feb 15 2008	Motion for leave to file a supplemental brief after argument filed by respondent GRANTED.
Feb 20 2008	Judgment REVERSED and case REMANDED. Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and Stevens, Scalia, Kennedy, Souter, Breyer, and Alito, JJ., joined. Thomas, J., filed a dissenting opinion.

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(1)

Supreme Court, U.S.
FILED

061463 MAY 4 - 2007

OFFICE OF THE CLERK

No. 06-

IN THE
Supreme Court of the United States

ARNOLD M. PRESTON,

Petitioner,

v.

ALEX E. FERRER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act and *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 126 S.Ct. 1204 (2006) preempt the holding in this case, voiding an interstate arbitration agreement under the California Talent Agencies Act?

PARTIES

The parties to this proceeding are Petitioner Arnold M. Preston and Respondent Alex E. Ferrer.

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Petitioner Arnold M. Preston respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the California Court of Appeal, *review denied* by the California Supreme Court, on the issue of Federal preemption.

OPINIONS BELOW

The *Order Denying Review* by the California Supreme Court is set forth at Petitioner's Appendix ("Pet. App.") 1a.

The *Majority Opinion* of the California Court of Appeal was reported as *Ferrer v. Preston* (2006) 145 Cal.App.4th 440, 51 Cal.Rptr.3d 628. The Opinion is set forth hereinbelow at Pet. App. 2a–12a.

The *Dissenting Opinion* of the Hon. Miriam A. Vogel, Justice, California Court of Appeal, is set forth at Pet. App. 12a–18a.

The *Memorandum Decision* by the Hon. Haley J. Fromholz, Judge, Los Angeles Superior Court, is set forth at Pet. App. 18a–27a.

JURISDICTION

The decision of the California Courts was final upon the denial of review by the California Supreme Court, entered on February 14, 2007. (Pet. App. 1a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a), as it involves an issue of Federal preemption under the Supremacy Clause of the U.S. Constitution (Article VI, clause 2) and the Federal Arbitration Act, 9 U.S.C. §2. *See, Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852 (1984).

STATUTES

The Federal Arbitration Act, 9 U.S.C. §2, states, in pertinent part:

> "A written provision in any...contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract...or the refusal to perform the whole or any part thereof....shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The California Talent Agencies Act, Labor Code §1700.44(a), states, in pertinent part:

> "In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard *de novo*."

STATEMENT OF THE CASE

Respondent Alex E. Ferrer ("Judge Ferrer") is a former Florida Circuit Court Judge who now makes his living as the star of *Judge Alex*, a television program syndicated nationwide by Twentieth Century Fox, in which Judge Ferrer arbitrates petty civil disputes as a form of entertainment. (Pet. App. 3a).

Petitioner Arnold M. Preston ("Preston") is an attorney, who now makes his living as an Artist's Manager, advising and

counseling artistic personnel in the motion picture/television industry. (Pet. App. 12a).

Mr. Preston and Judge Ferrer entered into a written contract ("Management Agreement") which provides for payment of a 12% fee on Judge Ferrer's earnings from *Judge Alex*. (Pet. App. 3a). The Management Agreement included a standard American Arbitration Association provision calling for arbitration of disputes. (Pet. App. 6a). The arbitration clause specifically provided that disputes about the "validity" and "legality" of the contract would be subject to arbitration. (Pet. App. 6a).

Judge Ferrer resides in Florida and tapes the *Judge Alex* television program in Texas. Mr. Preston had his office in California. (Pet. App. 11a). As it happened, Judge Ferrer was in Nevada when he signed the Management Agreement. (Pet. App. 11a). As such, the *interstate* nature of the contract has never been in dispute.

When *Judge Alex* went on the air, Judge Ferrer refused to pay the management fee, so Mr. Preston commenced a proceeding with the American Arbitration Association in Los Angeles, California. (Pet. App. 3a). Ferrer responded by filing an action with the California Labor Commissioner, challenging the legality of the *entire management contract* under the California Talent Agencies Act, and based thereon, he asked the Labor Commissioner to stay the arbitration. (Pet. App. 3a).

The Labor Commissioner's hearing officer determined she lacked the power to stay the pending arbitration, so Judge Ferrer filed an action in the Los Angeles Superior Court, seeking an injunction against the arbitration. (Pet. App. 4a). The Superior Court issued the injunction, stayed the arbitration, and ordered that the legality of the entire contract under the

Talent Agencies Act would be decided by the Labor Commissioner, not the Arbitrator. (Pet. App. 4a). There was no challenge to the arbitration clause itself and Judge Ferrer initialed every page of the contract. (Pet. App. 13a, 14a).

The California Court of Appeal affirmed in a 2-1 decision. The dissenting opinion by Justice Miriam A. Vogel argued that the Federal Arbitration Act (9 U.S.C. §2) and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204 (2006) ("*Buckeye*") preempted the majority decision, stating:

> "Because it is undisputed (correctly) that the contract before us is governed by the FAA...it follows necessarily that the arbitrator and not the court must determine the gateway issues. My colleagues' contrary conclusion – based on the fact that the *Buckeye* court did not consider whether the issue should go first to a state administrative agency – ignores *Buckeye's* holding that its rules trump conflicting state procedures." (Pet. App. 16a; *Ferrer v. Preston, supra*, 145 Cal.App.4th at 451 n.3, 51 Cal.Rptr.3d at 637 n.3).

The majority of the Court of Appeal did not dispute the applicability of the Federal Arbitration Act, but distinguished *Buckeye* on the grounds that the Talent Agencies Act vests initial jurisdiction in an *administrative agency* , whereas *Buckeye* involved an attempt to avoid arbitration by filing a lawsuit in a Court:

> "[Preston] argues that the Federal Arbitration

> Act...preempts California law requiring the Commissioner to first adjudicate the legality of the contract....¶*Buckeye* is inapposite...[because it] did not involve an administrative agency...[and] did not consider whether the FAA preempts application of the exhaustion doctrine." (Pet. App. 10a; *Ferrer v. Preston, supra*, 145 Cal.App.4th at 441, 51 Cal.Rptr.3d at 633–634)

The California Supreme Court denied Mr. Preston's Petition for Review without issuing an opinion. (Pet. App. 1a).

Decisions of the California Labor Commissioner are subject to a trial *de novo* in the Superior Court pursuant to California Labor Code §§ 98.2 and 1700.44(a). See, *Sinnamon v. McKay* (1983) 142 Cal.App.3d 847. As such, the Labor Commissioner hearing is just an *initial step* in a protracted adjudication process which usually winds up, like this case did, in the California Court system.

As it stands, pursuant to the California decision this case would be remanded to the Labor Commissioner, where an administrative hearing would be conducted on the legality of the entire contract, followed by a trial *de novo* in the Superior Court on the same issue, followed by another appeal.

Thus, absent a writ of certiorari, Mr. Preston's arbitration will ultimately take place *four to five years* after filing his original petition, and only after incurring oppressive legal fees litigating before the Labor Commissioner, *de novo* in the Superior Court, and a second time before the California appellate courts.

REASONS FOR GRANTING CERTIORARI

Since the Court of Appeal's decision was published, and review was denied by the California Supreme Court, this established a *controlling precedent* in California which effectively renders arbitration agreements in Artist's Manager contracts unenforceable.

The Artist's Manager profession is engaged in interstate commerce because the entertainment industry is national. As such, the anti-arbitration ruling in this case impacts the entire profession, including Artist's Managers located outside of California who represent clients who reside in California or obtain employment in California. Since a very large part of the entertainment industry is centered in California, this means that Artist Managers *nationwide* are adversely affected by California's anti-arbitration ruling.

The reasoning of the Court of Appeal also sets a precedent which can negate *Buckeye* and invalidate arbitration agreements under state law merely by inserting an administrative proceeding ahead of a decision by the Courts.

Nothing in *Buckeye* supports the Court of Appeal's conclusion that preemption under the Federal Arbitration Act vanishes merely because there is an administrative tribunal which acts as a precursor to litigation in the Courts. In the present case, the "exhaustion" doctrine means only that an expensive administrative proceeding will be conducted *before* the matter starts winding its way through the California Courts.

Petitioner submits the Court of Appeal's rationale is simply not a logical basis for avoiding Federal preemption. As stated in *Buckeye*, 546 U.S. 440, 126 S.Ct. at 1209:

> "[A]n arbitration provision is severable from the remainder of the contract....[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance....[T]his arbitration law applies in state as well as federal courts....[B]ecause respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court."

See, also, *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852 (1984)(California law voiding arbitration clause preempted by Federal Arbitration Act); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801 (1967).

This Petition involves a matter of great importance to the *entire profession of Artist's Managers*, who are engaged in interstate commerce but have now been deprived of their right to arbitrate under the Federal Arbitration Act.

Congress' goal in enacting the Federal Arbitration Act was to provide for the efficient, expeditious, and economical resolution of disputes. As illustrated by this case, that goal is utterly defeated by denying the arbitral forum based on state law. As stated by Justice Vogel, in her dissent:

> "When a former judge and a lawyer enter a contract in which they agree that any dispute about that contract will be resolved by arbitration, I think they ought to be bound by that agreement....¶Instead of the speedy, efficient, and relatively inexpensive procedure

> contemplated by the parties' contract, my colleagues have permitted Ferrer to cause a delay of years and triple or quadruple the parties' expenditures....That is not how it is supposed to work." (Pet. App. 12a, 17a)

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal and the Supreme Court of California

Respectfully submitted,

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APPENDIX

Appendix A

In The Supreme Court of California
En Banc

No. S149190

ALEX E. FERRER,

Plaintiff and Respondent

v.

ARNOLD M. PRESTON,

Defendant and Appellant

Petition for review DENIED.

George, Chief Justice

February 14, 2007

Appendix B

California Court of Appeal
Second Appellate District
Division 1

ALEX E. FERRER,

Plaintiff and Respondent,

v.

ARNOLD M. PRESTON,

Defendant and Appellant.

B188997

Decided: November 30, 2006

APPEAL from an order of the Superior Court of Los Angeles County, Haley J. Fromholz, Judge. Affirmed.

Schleimer & Freundlich and Joseph D. Schleimer, Beverly Hills, for Defendant and Appellant.

Mitchell, Silberberg & Knupp, Ronald A. DiNicola, Douglas W. Bordewieck, Kirsten E. Miller and Robert M. Dudnik, Los Angeles, for Plaintiff and Respondent.

INTRODUCTION

The defendant, Arnold M. Preston, appeals from an order denying his motion to compel arbitration and granting a motion by the plaintiff, Alex E. Ferrer, for a preliminary injunction and a stay of the action. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant is an attorney who renders services for personnel in the motion picture-television industry. Plaintiff is a former Florida Superior Court Judge, who now works arbitrating legal disputes on the television program, *Judge Alex*, on the Fox television network. Defendant contends that plaintiff breached a written agreement by failing to pay defendant certain fees based on plaintiff's earnings from his performance in *Judge Alex*.

On March 7, 2002, plaintiff signed a management contract with defendant, and the contract contained a standard American Arbitration Association (AAA) arbitration clause. On June 10, 2005, defendant initiated an arbitration proceeding against plaintiff, seeking to recover the fees to which he claimed he was entitled. On July 1, 2005, plaintiff filed a motion to stay the arbitration with the arbitrator. Plaintiff also filed a Petition to Determine Controversy (Petition) with the Labor Commissioner (Commissioner) and a motion asking the Commissioner to stay the arbitration. Defendant thereafter filed a motion to dismiss the Petition with the Commissioner. On October 12, 2005,

the arbitrator issued an order denying plaintiff's motion to stay the arbitration.

On November 2, 2005, plaintiff filed the instant complaint containing two causes of action, one for a declaration that the dispute involving the validity of the contract is not subject to arbitration, and the second for injunctive relief, seeking to restrain defendant from proceeding with the arbitration. On November 8, 2005, defendant filed a motion with the trial court to compel arbitration. On the same day, the Commissioner denied defendant's motion to dismiss plaintiff's petition. The Commissioner also denied plaintiff's motion to stay the arbitration, "on the grounds that the Labor Commissioner does not have the authority to stay arbitration proceedings." On November 10, 2005, plaintiff filed with the trial court a motion for preliminary injunction, attempting to restrain the defendant from proceeding with the arbitration unless and until the Commissioner determined that he had no further jurisdiction over the parties' dispute.

Plaintiff also filed a motion for reconsideration with the arbitrator. On December 6, 2005, the arbitrator granted the motion for reconsideration and stayed the arbitration pending disposition of the matter before the Commissioner.

On December 7, 2005, the trial court issued its order, denying defendant's motion to compel arbitration and granting plaintiff's motion for a preliminary injunction and staying the action pending final

resolution by the Commissioner of the Petition. The defendant has appealed from this order.

DISCUSSION

1. The Talent Agencies Act

The Talent Agencies Act (Act) (Lab. Code, § 1700 et seq.)[1] regulates the activities of a "talent agency," i.e., "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists . . . ." (§ 1700.4, subd. (a).) Artists include persons rendering professional services in television enterprises. (*Id.*, subd. (b).)

Section 1700.44, subdivision (a), of the Act states that "[i]n cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo."

Section 1700.5 of the Act states that "[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." The plaintiff contends that defendant was an unlicensed talent agent, and therefore their agreement is void and defendant is barred from

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[1] All statutory references hereinafter are to the Labor Code.

recovering the compensation he is seeking under the contract. The defendant asserts that he was acting as a personal manager, not as a talent agent, and he is not barred from recovering compensation for his services.

The question before us is who has original jurisdiction to make the determination as to the validity of the parties' contract. Defendant contends that the question of the contract's validity should be determined by the arbitrator, and the trial court therefore erred in refusing to compel arbitration. We disagree.

The parties' contract included a standard AAA arbitration clause, including a stipulation that the parties are to arbitrate any attack on the "validity or legality" of the contract. However, as interpreted by the courts, section 1700.44, subdivision (a), vests exclusive original jurisdiction in the Commissioner to resolve issues arising under the Act—including the issue of whether or not an individual such as defendant is a personal manager or an unlicensed talent agent. In *Styne v. Stevens* (2001) 26 Cal.4th 42 (*Styne*), the Supreme Court held that the Commissioner's exclusive original jurisdiction applies even where the Act is first raised by the artist as a defense to a claim for breach of contract by the personal manager/talent agent. (*Id.* at pp. 58-59.) In the present case, defendant asserted a claim that plaintiff had breached his contract and plaintiff submitted a Petition to Determine Controversy to the Commissioner to determine the issue of whether the contract involved the services of a talent agency. The Commissioner found that plaintiff had raised a "colorable" defense to defendant's claims, based on an alleged violation of the Act. The administrative

procedures before the Commissioner must be resolved before resort may be had to another tribunal. Contrary to defendant's suggestion, the fact that plaintiff is a sophisticated individual, with significant legal experience does not alter the decision of *Styne* or the procedure to follow.

As explained in *Styne v. Stevens*, *supra*, 26 Cal.4th at page 58, it is appropriate for the Commissioner to resolve the dispute between the parties, for "[t]he Commissioner's expertise in applying the Act is particularly significant in cases where, as here, the essence of the parties' dispute is whether services performed were by a talent agency for an artist." In addition, "the Commissioner['s]...interpretation of a statute he is charged with enforcing deserves substantial weight." (At p. 53.) In the present case, defendant commenced an arbitration seeking damages for breach of contract. In *Styne*, the action was initiated in superior court. We find the distinction to be of no consequence.

The trial court here correctly applied *Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347 (*Buchwald*) in refusing to order arbitration and staying the proceedings until the Commissioner resolved the question before him. The facts of *Buchwald* are on point to the case at bar. In *Buchwald*, the rock band known as "Jefferson Airplane" claimed that section 1700.44 made their contract with their manager, Matthew Katz (Katz), void because the manager had obtained employment for them without being licensed as a talent agent. Katz sought arbitration based upon an arbitration clause in his contract. The band filed a Petition to Determine Controversy with the Commissioner, contending that Katz was an unlicensed talent agent. The band also brought an action in superior court, attempting to prevent Katz from proceeding with arbitration. (*Id.* at pp. 351-353.)

The Court of Appeal held that the Commissioner had exclusive original jurisdiction over the controversy based upon the band's petition, and that the exhaustion doctrine applied. (*Id.* at p. 359.) In the present case, defendant sought to compel arbitration with plaintiff. Then plaintiff sought an order staying the arbitration and sought to require defendant to exhaust his administrative remedies before the Commissioner. As in *Buchwald*, the trial court properly granted plaintiff's request.

Defendant is unable to distinguish the facts in the present case from the facts in *Buchwald* and attempts to argue that *Buchwald* is no longer good law and has been overruled by *Styne*. However, the *Styne* opinion repeatedly cites *Buchwald*. Defendant relies on footnote 9 in *Styne* in support of the argument that *Buchwald* has been overruled. *Styne* at footnote 9 states that "the Talent Agencies Act specifically allows parties to provide in their contract that disputes thereunder shall be resolved by private arbitration, rather than by the Commissioner. (§ 1700.45.) Nothing in our reasoning restricts this right." (*Styne*, *supra*, 26 Cal.4th at p. 59, fn. 9.)

The footnote makes reference to section 1700.45 of the Act, entitled "Contract provision for arbitration; Provisions prerequisite to validity." *Styne* did not involve a contract containing an arbitration clause, so the Court did not consider whether the prerequisites of section 1700.45 were met.[2] To be valid under section 1700.45, the contract must

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[2] In relevant part, section 1700.45 states:

"Notwithstanding Section 1700.44, a provision in a contract providing for the decision by arbitration of any controversy under the contract or as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination, shall be valid:

satisfy either subdivisions (a) or (b), and it must also satisfy subdivisions (c) and (d). The contract between plaintiff and defendant does not satisfy subdivisions (c) or (d), in that it does not provide for notice to the Commissioner of all arbitration proceedings or give the Commissioner the right to attend the hearings.

Defendant further argues that *Buchwald* is not applicable because it was decided under a repealed statute, the "Artists' Managers Act." Defendant claims that the current Act eliminated the requirement that managers must have a license. The argument is not well taken. The Artists' Managers Act and the Talent Agencies Act are very similar in relevant aspects. While they differ slightly in the definitions of "artists' manager" and "talent agent,"[3] sections

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"(a) If the provision is contained in a contract between a talent agency and a person for whom the talent agency under the contract undertakes to endeavor to secure employment, or

"(b) If the provision is inserted in the contract pursuant to any rule, regulation, or contract of a bona fide labor union regulating the relations of its members to a talent agency, and

"(c) If the contract provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings, and

"(d) If the contract provides that the Labor Commissioner or his or her authorized representative has the right to attend all arbitration hearings."

[3] Section 1700.4 of the Artists' Managers Act defined artists' managers as follows: "An artists' manager is hereby defined to be a person who engages in the occupation of advising, counseling, or directing artists in the development or advancement of their professional careers and who procures, offers, promises or attempts to procure employment or engagements for an artist only in connection with and as a part of the duties and obligations of such person under a contract with such artist by which such person contracts to render services of the nature above mentioned to such artist."

Section 1700.4, subdivision (a), of the Talent Agencies Act provides as follows: "'Talent agency' means a person or corporation who

1700.44 and 1700.45 of both acts are identical in relevant points.

While defendant argues that he is a manager and not required to obtain a license, the Commissioner denied defendant's motion to dismiss for lack of subject matter jurisdiction, indicating that "this case presents a colorable basis for the exercise of the Labor Commissioner's jurisdiction and therefore, the matter must be submitted to the Labor Commissioner for determination." This being the case, the questions as to whether defendant is a talent agent and whether his contract with plaintiff is valid properly are submitted to the Commissioner in the first instance.

2. Federal Preemption

Defendant also argues that the Federal Arbitration Act (9 U.S.C. § 1 et seq.) (FAA) preempts California law requiring the Commissioner to first adjudicate the legality of the contract. Defendant relies on the case of *Buckeye Check Cashing, Inc. v. Cardegna* (2006) ___ U.S. ___ [126 S.Ct. 1204] (*Buckeye*).

Buckeye is inapposite, however. *Buckeye* did not involve an administrative agency with exclusive jurisdiction over a disputed issue. *Buckeye* did not consider whether the FAA preempts application of the exhaustion doctrine. *Buckeye* held, as between a court and an arbitrator, the

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engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers."

arbitrator and not the court hears "a challenge to the validity of the contract as a whole." (*Buckeye, supra*, ___ U.S. at p. ___ [126 S.Ct. at p. 1210].) *Buckeye* did not discuss whether a challenge to a contract as a whole should first have been made to an administrative agency where there is a statute vesting the agency with exclusive original jurisdiction to decide a challenge based on specific grounds.

3. *California Labor Code's Application to the Dispute*

Defendant finally argues that the California Labor Code does not apply, on the theory that plaintiff lives and works outside of California.[4] However, defendant lives and works in California, he signed the contract in California, and he instituted arbitration in California. In addition, the contract contains a choice of law clause stating that "[t]his agreement shall be governed by the laws of the state of California, applicable to agreements wholly entered into and performed herein." Defendant's argument is without merit.

CONCLUSION

While there is a strong public policy in favor of contractual arbitration (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th, 1, 9; *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 702), the *Buchwald* case is very clear and requires the Commissioner to determine first the issue of whether defendant is required to have a license in order to recover on a breach of contract from plaintiff. As noted in *Styne v. Stevens, supra*, "controversies colorably arising under the Talent Agencies Act are within the exclusive original jurisdiction of the Commissioner," whether raised by

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[4] Plaintiff is a resident of Florida, employed in Texas, and signed the arbitration agreement in Nevada.

the party bringing an action or as a defense. (26 Cal.4th at p. 59.) The fact that the losing party will have a right to a de novo hearing, involving additional time and money, does not excuse the defendant from the legal requirement to exhaust his administrative remedies.

The order is affirmed.

JACKSON, J.*

I concur: MALLANO, Acting P. J.

VOGEL, J., Dissenting.

When a former judge and a lawyer enter a contract in which they agree that any dispute about that contract will be resolved by arbitration, I think they ought to be bound by that agreement.

A.

On March 7, 2002, Arnold M. Preston (a lawyer) and Alex E. Ferrer (a former lawyer and former Florida trial judge who now decides cases for a television series, "Judge Alex") signed a six-page "Personal Management Agreement" in which Ferrer agreed to pay Preston 12 percent of his earnings from "Judge Alex" in consideration for Preston's services as a personal manager, and to arbitrate any dispute about the terms of the contract or its "validity or legality."[5]

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[5] As relevant, the arbitration provision provides: "In the event of any dispute under or relating to the terms of this agreement, ***or the breach, validity, or legality thereof***, it is agreed that the same shall be submitted to arbitration to the American Arbitration Association in the city of Los Angeles, California, and in accordance with the rules promulgated by the

Although Ferrer modified several of the contract's provisions (by handwritten interlineations and other markings), he made no changes to the arbitration provision. He initialed every page. In 2005, Ferrer refused to pay Preston's fees.

On June 10, 2005, Preston filed a demand for arbitration with the American Arbitration Association, seeking damages for breach of contract based on Ferrer's failure to pay his fees. Ferrer's lawyer appeared in the arbitration and defended the action for six months, during which he moved (successfully) for the recusal of the arbitrator first assigned to decide the dispute, moved (unsuccessfully) for a stay of the arbitration proceedings,[6] and participated in a scheduling conference at which the second arbitrator set the arbitration hearing for January 26, 2006.

On July 5, 2005, Ferrer filed a petition with the Labor Commissioner, alleging among other things that Preston was acting as an unlicensed talent agent in violation of the Talent Agencies Act (Lab. Code, § 1700 et seq.), not as a personal manager, and claiming the contract was void. On the same day, Ferrer (by motion) asked the Commissioner to stay the arbitration proceedings. On November 8, the Commissioner denied the motion on the ground that he lacked jurisdiction

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said association, and judgment upon the award rendered by the arbitrator(s) may be entered into any court having jurisdiction thereof. . . ." (Emphasis added.)

[6] The motion for a stay was filed with the arbitrator on July 1, 2005, on the ground that Ferrer intended to -- but had not yet -- filed a petition asking the Labor Commissioner of the State of California to determine the controversy. The arbitrator denied the motion because its merits could not be determined without an evidentiary hearing.

to stay an arbitration.

Undeterred, Ferrer filed the superior court action now before us, seeking a declaration that the dispute is not subject to arbitration and an injunction staying the arbitration proceedings. Preston appeared and filed a motion to compel arbitration. Ferrer filed a motion for a preliminary injunction. Ferrer prevailed -- the trial court denied Preston's motion to compel arbitration and issued a preliminary injunction staying the arbitration proceedings.

In none of these proceedings did Ferrer challenge the validity of the arbitration clause.

B.

When fully informed parties with equal bargaining power agree to arbitrate any dispute that arises out of their business dealings because arbitration is an efficient, expeditious, economical and fair means of resolving their dispute, their agreement ought to be enforced. (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 702-703, 706-707.) When the arbitration agreement includes a clear, express, and unequivocal agreement that the arbitrator shall decide jurisdictional issues -- that is the "validity" and "legality" of the contract -- that agreement ought to be enforced. (*Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1249 [a court may not consider a claim that an arbitration provision is unenforceable if it is a subterfuge for a challenge to the entire agreement because that contention must be submitted to the arbitrator].) In my view, *Styne v. Stevens* (2001) 26 Cal.4th 42 supports my interpretation, not the views

expressed by my colleagues.

There was no arbitration provision in the *Styne* contract, and the issue decided there was that, in a lawsuit arising under the Talent Agencies Act, the dispute must be referred to the Labor Commissioner, and the proceedings before the Commissioner must be concluded before the parties can proceed *to the superior court*. (*Style v. Stevens, supra,* 26 Cal.4th at pp. 54-56.) Indeed, the Supreme Court expressly rejected an argument that its holding would undermine similar contracts with arbitration provisions, noting that "[n]othing in [its] reasoning restricts" the parties' right to provide in their contract that their disputes shall be resolved by private arbitration rather than by the Commissioner. (*Id.* at p. 59, fn. 9.)

My colleagues, assuming their own conclusion, dismiss this language on the ground that the arbitration provision before us does not conform to the Talent Agencies Act's requirements as set out in Labor Code section 1700.45. (Maj. opn., p. 6, fn. 2.) Their approach ignores the fact that the parties signed a "Personal Management Contract," not a Talent Agent's Contract, and the only reason the Talent Agencies Act is relevant is that Ferrer claims the agreement is not what it appears to be and that Preston was in fact acting as an unlicensed talent agent. Based on the parties' agreement, this threshold issue -- which quite plainly has to do with the "validity" and "legality" of the contract -- must be decided by the arbitrator, not the Commissioner or the trial court. (Cf. *Buckeye Check Cashing, Inc. v.*

Cardegna (2006) ___ U.S. ___ [126 S.Ct. 1204, 1210]; *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444.)[7] If after an evidentiary hearing the arbitrator agreed that Ferrer had raised a colorable defense (that Preston was wrongfully acting as an unlicensed talent agent), the arbitrator would then determine whether the arbitration provision substantially complied with Labor Code section 1700.45 (keeping in mind that Ferrer has never challenged the validity of the arbitration clause). If the arbitrator found substantial compliance, he would determine the dispute. If not, the arbitrator would dismiss the arbitration proceedings, leaving the parties

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[7] *Buckeye* establishes "three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts. [Because the challenge in this case is to the] Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court." (*Buckeye Check Cashing, Inc. v. Cardegna, supra,* 126 S.Ct. at p. 1209.) Because it is undisputed (correctly) that the contract before us is governed by the FAA (*Higgins v. Superior Court, supra* 140 Cal.App.4th at p. 1247), it follows necessarily that the arbitrator and not the court must determine the gateway issues. My colleagues' contrary conclusion -- based on the fact that the *Buckeye* court did not consider whether the issue should go first to a state administrative agency -- ignores *Buckeye's* holding that its rules trump conflicting state procedures. *Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347 -- a case that is almost 40 years old and based on a different statutory scheme -- did not have an arbitration provision that vested the arbitrator with jurisdiction to determine the threshold questions at issue in this case and *Buchwald* thus provides no authority for the majority's conclusion. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1081, fn. 3 [cases are not authority for propositions not considered].) I also question whether *Buchwald* survives *Buckeye*.

to exhaust their administrative remedies before the Commissioner, then ultimately resolve their dispute in the superior court.

Instead of the speedy, efficient, and relatively inexpensive procedure contemplated by the parties' contract, my colleagues have permitted Ferrer to cause a delay of years and triple or quadruple the parties' expenditures. (Lab. Code, §§ 98.2, 1700.44, subd. (a); *Sinnamon v. McKay* (1983) 142 Cal.App.3d 847, 850 [the Labor Commissioner's findings are not binding, and each party has a right to trial de novo in the superior court].) That is not how it is supposed to work.[1]

I would reverse, and direct the trial court to grant Preston's petition for arbitration and stay both the court proceedings and the proceedings before the

Commissioner pending the arbitrator's decision.

VOGEL, J.

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[1] There is yet another reason to reverse. Ferrer established his "colorable" defense under the Talent Agencies Act by argument, not by evidence, and the trial court then relied on the existence of this defense to support its decision to issue a preliminary injunction staying the arbitration proceedings. Put another way, there is no evidence at all to support issuance of the preliminary injunction, and this fact alone requires reversal. (*San Francisco Newspaper Printing Co. v. Superior Court* (1985) 170 Cal.App.3d 438, 441-442 [a preliminary injunction must be supported by evidence establishing the moving party's probability of success on the merits]; *Higgins v. Superior Court, supra,* 140 Cal.App.4th at p. 1249 [the party opposing a petition to compel arbitration bears the burden of proving by a preponderance of evidence any facts necessary to his defense].)

Appendix C

Superior Court of the State of California
for the County of Los Angeles

ALEX E. FERRER,	)	Case No. BC342454
	)	
Plaintiff	)	ORDER
	)	
vs.	)	
	)	
ARNOLD PRESTON,	)	
	)	
Defendant	)	
	)	

Motion of Defendant to Compel Arbitration;

Motion of Plaintiff for Preliminary Injunction;

Motion to compel arbitration is denied; motion for preliminary injunction is granted.

This case arises from a claim for fees: Defendant Arnold M. Preston alleges that Plaintiff Alex E. Ferrer breached a written contract by failing to pay Defendant certain fees based on Plaintiff's earnings from his performance in a television program entitled "Judge Alex."

On June 10, 2005, Defendant filed an arbitration demand with the American Arbitration Association. Defendant provides a copy of the agreement on which the suit is based. Both sides acknowledge that they entered into the agreement. Paragraph 13 of the agreement provides:

> "In the event of any dispute under or relating to the terms of this agreement, or the breach, validity, or legality thereof, it is agreed that the same shall be submitted to arbitration by the American Arbitration Association in the city of Los Angeles, California, and in accordance with the rules promulgated by the said association, and judgment upon the award rendered by the arbitrator(s), may be entered into any court having jurisdiction thereof." (Motion to Compel, Exhibit B).

Plaintiff moved the Arbitrator on July 1, 2005 for an order staying the arbitration pending the disposition of Plaintiff's petition to determine controversy before the Labor Commissioner. Plaintiff's motion to stay was made pursuant to Labor Code §1700.44 and §1700.45, section 12022 of the California Code of Regulations, and *Styne v. Stevens* (2001) 26 Cal.4th 42. (Motion to Compel, Exh. C).

Plaintiff filed a motion to stay the arbitration and a petition to determine controversy with the Labor Commissioner on July 5, 2005. This motion was premised on the same grounds as Plaintiff's motion to stay brought before the Arbitrator.

The Arbitrator denied Plaintiff's motion on October 12, 2005 and set the hearing on the merits for January 26, 2005, stating:

> "Applicable authority cited by both parties acknowledges that 'the Talent Agencies Act specifically allows parties to provide in their contract that disputes thereunder shall be resolved by private arbitration, rather than by the Commissioner.' (§1700.45). *Styne v. Stevenson*, 26 Cal.4th 42, 58, fn.9 (2001). Furthermore, the motion was predicated upon a favorable resolution of disputed questions

of fact which cannot be determined at this time without evidence or hearing." (Motion to Compel, Exh. D.)

On November 2, 2005, Plaintiff filed this action against Defendant seeking (1) Declaratory Relief, and (2) Preliminary and Permanent Injunctions.

On November 8, 2005, the Labor Commissioner denied Plaintiff's motion to stay "on the grounds that the Labor Commissioner does not have the authority to stay arbitration proceedings. Such a motion must be made directly to the arbitrator or to the superior court." (Opposition to Preliminary Injunction, Exh. F). The Labor Commissioner also denied Defendant's motion to dismiss the case for lack of subject matter jurisdiction and scheduled a March 6, 2006 hearing on the matter, citing *Styne* and ruling that "this case presents a colorable basis for exercise of the Labor Commissioner's jurisdiction and therefore, the matter must be submitted to the Labor Commissioner for determination." (*Id.*)

Plaintiff moves this court for an order, under C.C.P. §526, C.C.P. §527 and Labor Code §1700.00-1700.47, preliminarily enjoining Defendant from proceeding with the pending arbitration against Plaintiff unless and until the Labor Commissioner determine that he or she is without jurisdiction over the disputes between Preston and Ferrer.

Defendant moves this court for an order under C.C.P. §1281.2 compelling arbitration based on a written arbitration agreement.

The main issue before the Court is whether or not Labor Code §1700.45 permits arbitration under the circumstances of this case, despite §1700.44's grant of

original jurisdiction to the Labor Commissioner over "controversies arising under this chapter."

1. Motion to Compel Arbitration

Labor Code 1700.45

Defendant argues, and Plaintiff does not dispute, that the signed written agreement between the parties contains an agreement to arbitrate under the rules of the AAA. (Motion 4:11–13; Exhibit B, ¶13).

Plaintiff argues that the contract's arbitration provision does not confer jurisdiction on the Arbitrator to resolve the parties' disputes as to the validity of the contract because jurisdiction lies exclusively with the Commissioner. (Opposition 2:26–27; 3:1–2).

Further, Plaintiff argues that even if an arbitrator has authority to determine the issue of a contract's validity where the contract meets the requirements of Labor Code §1700.45, the contract at issue here does not meet those requirements. (Opposition 6:14–17). Plaintiff contends that the contract does not meet the requirements of §1700.45(a) because (1) Defendant does not assert that he ever was or acted as a talent agency, (2) the contract does not comply with the Act's requirements for 'contracts for the services of talent agencies" set forth in Section 1700.23 of the Act, and (3) there is nothing in the contract that provides or suggests that Defendant "undertakes to endeavor to secure employment" for Plaintiff. (Opposition 7:14–25; 8:1–6).

Labor Code §1700.45(a) provides:

Notwithstanding Section 1700.44, a provision in a contract providing for the decision of any controversy under the contract or as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination, shall be valid: (a) If the provision is contained in a contract between a talent agency and a person for whom the talent agency under the contract undertakes to endeavor to secure employment....

Labor Code §1700.45(b)–(d) apply only if the arbitration agreement is pursuant to a collective bargaining agreement.

Buchwald v. Katz (1967) 254 Cal.App.2d 347

Plaintiff contends that the agreement is void because Defendant attempted to procure employment for Plaintiff while not licensed as a talent agent by the Labor Commissioner. (Opposition 1:8–9). In addition, Plaintiff argues that *Buchwald v. Katz* (1967) 254 Cal.App.2d 347 establishes that if a contract is void under the Talent Agencies Act, its arbitration clause is also invalid. (Opposition 4:1–2).

In *Buchwald,* defendant, Matthew Katz, claiming unpaid fees, commenced arbitration before the AAA, as provided for in the contracts with plaintiffs, with members of the musical group, Jefferson Airplane. Jefferson Airplane filed a petition to determine controversy with the Labor Commissioner. While the petition was pending, Jefferson Airplane filed an action against Katz in superior court, seeking to restrain him from proceeding with the arbitration. Katz countered with a motion to compel arbitration and to restrain the proceedings before the Labor Commissioner. The superior court compelled arbitration and enjoined the

proceedings before the Labor Commissioner. (254 Cal.App.2d at 353).

The Court of Appeal reversed, holding that the argument for arbitration "overlooks the basic contention of petitioners that their agreement with Katz is wholly invalid because of his noncompliance with the Act. If the agreement is void no rights, including the claimed right to private arbitration, can be derived from it." (*Id.* at 360).

Jefferson Airplane presented both to the superior court and to the Labor Commissioner "evidence" in support of their contentions that Katz had agreed to and had in fact procured employment for Jefferson Airplane without a license and without having the contracts approved by the Labor Commissioner. (*Id.* at 353). The Court stated that Jefferson Airplane's "petition filed with the labor commissioner alleges facts which if true indicate that the written contracts were but subterfuges and that Katz had agreed to, and did, act as an artists' manager" (*Id.* at 355) and that "a prima facie showing was made to the labor commissioner that Katz had so agreed and had so acted [as an artist's manager]." (*Id.* at 360).

Here, the Labor Commissioner has found that Plaintiff, in his petition to determine controversy, has presented a "colorable" claim that the Talent Agencies Act applies and has been violated by Defendant. In his petition, Plantiff alleges that Defendant procured employment for Plaintiff. (Motion for Preliminary Injunction, Exh. B.)

Here, the contract between the parties does not provide for Defendant to procure employment for Plaintiff. (Motion, Exhibit B). In fact, Defendant disputes that he is a "talent agent" and denies that he procured employment for

Plaintiff. Therefore, the contract does not fall under Labor Code §1700.45(a), and that section specifically provides that "a provision in a contract providing for the decision by arbitration of any controversy arising under this chapter which does not meet the requirements of this section is not made valid by Section 1281 of the Code of Civil Procedure."

Styne v. Stevenson (2001) 26 Cal.4th 42

Styne at fn. 9 states: "the Talent Agencies Act specifically allows parties to provide in their contract that disputes thereunder shall be resolved by private arbitration, rather than by the Commissioner (§1700.45). Nothing in our reasoning restricts this right." 26 Cal.4th at 58, fn.9. Plaintiff contends that *Styne* does not overrule *Buchwald*. (Opposition 5:10).

Buchwald appears to stand for the proposition that an allegation that respondent is acting as an artist's manager (talent agent here) without a license is enough for the Talent Agencies Act to apply to the underlying contract. The text of *Styne* does not disagree. It stands for the proposition that when the Talent Agencies Act is invoked in the course of a contract dispute, the Labor Commissioner has exclusive jurisdiction over the matter, including whether the contract involved the services of a talent agent. *Styne* cites extensively to *Buchwald* and never disapproves it.

Further, the Labor Commissioner has determined that Plaintiff has a "colorable claim" under the Talent Agencies Act and *Styne* holds that "the Commissioner, whose interpretation of a statute he is charged with enforcing deserves substantial weight." (26 Cal.4th at 53).

Defendant refers to footnote 9 on page 58 of *Styne* and argues that it provides that arbitration is available under the circumstances of this case notwithstanding *Buchwald*. However, it appears that the footnote means that §1700.45 makes arbitration available for disputes under §1700.44, but only when it is undisputed that the dispute is between a "talent agency and a person for whom the talent agency under the contract undertakes to endeavor to secure employment..." (1700.45 (a)). *Buchwald* is consistent with this conclusion (254 Cal.App.2d at 373).

The Artist's Managers Act

Defendant further argues that *Buchwald* is not applicable as it was decided under a repealed statute, the "Artist's Managers Act." Defendant argues that the Talent Agencies Act eliminated the requirement that managers must have a license. (Reply 2:1–14). That is irrelevant.

The Artist's Managers Act and the Talent Agencies Act are closely similar in relevant respects. While they differ slightly in the definitions of "artist's manager" and "talent agent," both are primarily aimed at requiring that anyone who procures employment for an "artist," as defined by statute, is licensed. (*See* Labor Code §1700.5, and the Artist's Managers Act Section 1700.5). Sections 1700.44 and 1700.45 of both are identical in relevant points.

"It is a cardinal principal of statutory construction that where legislation is framed in the language of an earlier enactment on the same or an analogous subject, which has been judicially construed, there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment." *Greve v. Leger, Ltd.*, (1966) 64 Cal.2d 853, 965.

Waiver/Estoppel

Defendant argues that over the past six months Plaintiff has actively participated in the arbitration and thereby waived his objection to arbitration. (Motion 3:4–19). Yet, Defendant presents no authority in support of this argument.

"Territorial Jurisdiction"

Defendant also argues that Plaintiff has not demonstrated the "territorial jurisdiction" of the Talent Agencies Act: he claims that Plaintiff is a resident of Florida, employed in Texas, and signed the arbitration agreement in Nevada, and has not adduced territorial-jurisdictional facts to show the California Labor Code applies to him. (Motion 5:15; 6:1-4).

Defendant presents no authority in support of this argument.

2. Motion for Preliminary Injunction

Plaintiff moves the Court for an order preliminarily enjoining Defendant from proceeding with the pending arbitration against Plaintiff unless and until the Labor Commissioner determines that he or she is without jurisdiction over the disputes between Preston and Ferrer.

The parties present the same arguments in support of and in opposition to this motion as they do in respect to Defendant's motion to compel arbitration.

Therefore, in light of the Court's ruling above, and the need to avoid inconsistent rulings on the same issues and

between the same parties, the motion for preliminary injunction is granted.

Dated: December 7, 2005

Haley J. Fromholz,
Judge of the Superior Court

Supreme Court, U.S.
FILED
JUL 11 2007
OFFICE OF THE CLERK

No. 06-1463

In The
Supreme Court of the United States

ARNOLD M. PRESTON,

Petitioner,

v.

ALEX E. FERRER,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. § 2 (the "FAA"), preempts California legislation regulating "talent agencies" (as defined by the legislation) that, as interpreted by California courts, provides that a dispute regarding contract validity (including a dispute arising from a contract with an arbitration provision) between an individual or a company that is alleged to have functioned as a talent agency without having obtained the required state license and an "artist" (e.g., performer), who is making that allegation, is to be initially submitted to an administrative agency that has expertise in matters pertaining to that type of dispute, where the legislation also provides that if either party is dissatisfied with the administrative agency's ruling, she/he/it has the right to have the dispute heard de novo by a court, unless it is determined that the arbitration provision requires that the de novo hearing be conducted by an arbitrator (which is a determination that has not yet been made in this case)?

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PRELIMINARY STATEMENT

The decision of the court below does not undermine the viability of arbitration provisions contained in contracts involving interstate commerce, nor does it invalidate the arbitration provision in Petitioner's contract with Respondent. The decision, which is of virtually no importance to other than a small group of individuals and companies, merely holds that, pursuant to an unusual statutory scheme created by the California legislature, certain disputes between individuals or companies that meet the statutory definition of a "talent agency" (regardless of whether they label themselves as such) and their artist clients, including the dispute between Petitioner and Respondent regarding the validity of their contract arising from Respondent's claim that Petitioner functioned as a talent agency notwithstanding his failure to obtain the requisite license, must, as an initial matter, be heard by the California Labor Commissioner, whose ruling is subject to a de novo hearing by a court, or in some circumstances an arbitrator, at the request of the party dissatisfied with the Commissioner's ruling. Accordingly, the decision of the court below is not in conflict with the FAA or *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204 (2006).

STATEMENT OF THE CASE

Petitioner Arnold M. Preston ("Preston") is a self-styled "artist's manager." Those who style themselves as "artist's managers" are often also referred to as "personal managers" or just "managers" and typically provide advice and counsel to individuals who perform services in the

entertainment industry, such as actors, directors, writers and musicians.

Respondent Alex E. Ferrer ("Ferrer") is a former Florida state court judge who now headlines the "Judge Alex" television program on which he arbitrates disputes.

In 2002, Ferrer signed a management contract with Preston (the "Agreement"). The Agreement, which contains an arbitration provision, was signed by Preston in California, where he resided at the time, and also contains a choice of law clause stating that "[t]his agreement shall be governed by the laws of the state of California, applicable to agreements wholly entered into and performed herein." (Pet. at App. 11a.)

The California Talent Agencies Act (the "Act") (Cal. Lab. Code, § 1700 et seq.) regulates the activities of a "talent agency," i.e., "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists. . . ." (Cal. Lab. Code, § 1700.4, subd. (a).) "Artists" include persons such as Ferrer who render services in television programs. (*Id.*, subd. (b).) (Pet. at App. 5a.)

Section 1700.5 of the Act states that "[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the [California] Labor Commissioner." (Pet. at App. 5a.)

Section 1700.44, subdivision (a), of the Act states that "[i]n cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after

determination, to the superior court where the same shall be heard de novo." (Pet. at App. 5a.)

According to the California Supreme Court, the Labor Commissioner has "expertise in applying the Act." (Pet. at App. 7a.)

Preston does not assert that he ever has been a talent agency licensed by the California Labor Commissioner.

Ferrer refused to pay Preston the commission provided for in the Agreement that Preston alleged he was owed based on Ferrer's earnings from the "Judge Alex" program. In defense, Ferrer contends, among other things, that Preston functioned as a talent agency by attempting to secure employment for him and that the Agreement therefore is void pursuant to the Act, and Preston thus is barred from recovering under the Agreement.

Based on the Agreement's arbitration provision, Preston instituted an arbitration proceeding seeking the disputed commission. Thereafter, based on the Act, Ferrer filed a Petition to Determine Controversy with the Labor Commissioner seeking a ruling that the Agreement is void, and filed an action in California state court (the Superior Court for the County of Los Angeles) seeking, among other things, to preliminarily enjoin the arbitration from proceeding until the Labor Commissioner rules on the contract validity issue, which ruling would end the Commissioner's jurisdiction over the parties' dispute (an event that has not yet occurred). In response to Preston's opposition to Ferrer's Petition to Determine Controversy, the Labor Commissioner ruled that "the matter must be submitted to the Labor Commissioner for determination." (Pet. at App. 10a.) Ferrer obtained the preliminary injunction that he sought, and Preston filed an interlocutory

appeal. The California Court of Appeal affirmed the preliminary injunction order, holding that Preston was required to "exhaust his administrative remedies" (Pet. at App. 8a) in front of the Labor Commissioner "before resort may be had to another tribunal." (Pet. at App. 7a.) Preston's Petition for Review addressed to the California Supreme Court was denied. Preston then filed the instant Petition for a Writ of Certiorari.

There has been no ruling yet regarding who, as between the superior court and the arbitrator, will hear de novo the parties dispute regarding the validity of the Agreement in the event that the party who is dissatisfied with the ruling of the Labor Commissioner exercises his express statutory right under the Act to have the dispute heard de novo. Indeed, that issue has not yet even been addressed in any of the proceedings in this case, including those in the Court of Appeal.

REASONS FOR DENYING CERTIORARI

1. The Decision Below Does Not Raise the Question Presented In Preston's Petition And Does Not Void An Arbitration Agreement

The sole Question Presented in Preston's Petition is whether the FAA and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204 (2006), "preempt the holding in this case, voiding an interstate arbitration agreement under the California Talent Agencies Act?" (Pet. at i.) There is, however, no holding by the California Court of Appeal "voiding an interstate arbitration agreement" (i.e., the arbitration provision in the Agreement). In fact, there is nothing in the Court of Appeal's opinion that

contradicts the fact that, pursuant to the arbitration provision in the Agreement, the entirety of the dispute between the parties, including the issue of validity of the Agreement, may, at Preston's request, be heard and decided de novo by an arbitrator after the Labor Commissioner issues his ruling. Put simply, Preston grounds his Petition on the false premise that if he is dissatisfied with the Labor Commissioner's ruling regarding the validity of the Agreement and he exercises his right to have a de novo hearing, that hearing necessarily will be conducted by the superior court. (Pet. at 5.) However, the issue of whether the de novo hearing will be conducted by a court or an arbitrator has not yet been litigated in any forum in this case, including the Court of Appeal. Accordingly, notwithstanding the ruling that will emanate from the Labor Commissioner, the entirety of the parties dispute, including the issue of the validity of the Agreement, subsequently may be decided by an arbitrator.

A state legislative scheme which provides that at the request of a party to a dispute arising from a contract, including a contract containing an arbitration provision, an administrative agency with expertise in a field shall, as an initial matter, render a non-definitive ruling regarding the dispute, without prejudice to the dispute subsequently being heard and determined de novo by an arbitrator, is not inconsistent with either the letter or spirit of the FAA or *Buckeye*. In arguing that the California Court of Appeal misapplied *Buckeye*, Preston is mistaken.

Preston's assertion that the Court of Appeal holding "effectively renders arbitration agreements in Artist's Manager contracts unenforceable," (Pet. at 6) is wrong. First, as discussed below, the holding has no effect on managers who do not do business in California. Second,

the holding has no effect on contractual disputes between artists and managers who do conduct business in California, where the artists do not assert that their managers functioned as talent agencies even though not licensed to do so by the Labor Commissioner. Third, as discussed above, even where a manager's artist client asserts that the manager functioned as an unlicensed talent agency, the holding of the Court of Appeal does not render the arbitration provision in their contract unenforceable. Rather, the Court of Appeal merely held that disputes as to the validity of contracts between artists and individuals or companies who the artists allege functioned as unlicensed talent agencies are to be submitted, initially, to the Labor Commissioner. The Court of Appeal holding does not address the issue of who, as between an arbitrator and a court, decides such a dispute if the party dissatisfied with the Labor Commissioner's ruling exercises his statutory right to have a de novo hearing. As stated by the Court of Appeal, "The administrative procedures before the Commissioner must be resolved ***before*** resort may be had to ***another tribunal***," (Pet. at App. 6a & 7a) and "[T]he questions as to whether [Preston] is a talent agent and whether his contract with [Ferrer] is valid properly are submitted to the Commissioner ***in the first instance.***" (Pet. at App. 10a.)

2. The Question Presented Is Of Importance To Only A Limited Group Of Individuals And Companies

This case is virtually of no interest or importance to anyone other than to those who function in the California entertainment industry and, more particularly, to personal managers who (a) do business in California, (b) allegedly

function as unlicensed talent agencies, and (c) have contracts containing arbitration provisions with the artists who are making those allegations. There is no support for Preston's assertion that "this case impacts the entire profession, including Artist's Managers located outside of California who represent clients who reside in California or obtain employment in California." (Pet. at 6.) The Act, which requires individuals and corporations that function as talent agencies to become licensed by the California Labor Commissioner, applies only to those who do business in California. California cannot regulate the activities of managers who reside and do business in other entertainment centers such as New York City, Chicago, Detroit and Miami for clients residing outside of California.

Nor is there any reason to believe that the statutory scheme embodied in the Act, and therefore this case, otherwise has any nationwide importance. For example, Ferrer has no reason to believe that any state other than California has a statutory scheme that is similar to the one embodied in the Act and that relates to talent agencies in particular, or the entertainment industry in general, or any other industry, *i.e.*, a scheme whereby a contractual dispute must first be submitted to an administrative agency with expertise in the particular field of business for what amounts to an advisory, non-definitive ruling before the dispute is submitted, at the request of the party dissatisfied with the administrative agency ruling, for de novo hearing and decision by an arbitrator or a court.

3. Summary

The Court of Appeal in this California-centric case, which is of no national importance, did not purport to

decide who, as between an arbitrator and the court, will hear and decide de novo the issue of the validity of the Agreement in the event that Preston (a) is dissatisfied with the Labor Commissioner's ruling, (b) exercises his statutory right to have the dispute heard de novo, and (c) seeks to have that de novo hearing conducted, and the de novo decision made, by an arbitrator. If all of that comes to pass and Preston were to be precluded from having the dispute arbitrated by reason of a court ruling ordering that the required de novo hearing be conducted by the court, rather than by an arbitrator, then, and only then, would an issue arise as to whether there is a conflict with the FAA.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

ARNOLD M. PRESTON,

Petitioner,

v.

ALEX E. FERRER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Respondent and his amicus, William Morris Agency, have made a number of factual allegations without citation to the record. Since Judge Ferrer failed to introduce any evidence during the Superior Court proceedings, if his counsel had provided citations, it would have underscored the fact that *none* of his averments are based on *evidence*.

In her dissent, Justice Miriam Vogel commented on the total lack of evidence to support Judge Ferrer's case, stating:

> There is yet another reason to reverse. Ferrer established his "colorable" defense under the Talent Agencies Act *by argument, not by evidence*, and the trial court then relied on the existence of this defense to support its decision to issue a preliminary injunction staying the arbitration proceedings. Put another way, *there is no evidence at all* to support issuance of the preliminary injunction, and this fact alone requires reversal. (*San Francisco Newspaper Printing Co. v. Superior Court* (1985) 170 Cal.App.3d 438, 441-442) [a preliminary injunction must be supported by evidence establishing the moving party's probability of success on the merits]; *Higgins v. Superior Court, supra*, 140 Cal.App.4th at p. 1249 [the party opposing a petition to compel arbitration bears the burden of proving by a preponderance of evidence any facts

necessary to his defense].)

Petitioner's Appendix ("Pet. App.") 17a, n.8 (Emphasis added)

The legal issue presented to this Court is FAA preemption, and the specific question is whether Respondent must present his allegations to an arbitrator. In this context, the *ipse dixit* allegations by Respondent and his amicus, including facts asserted for the first time in the Supreme Court, should be disregarded, or stricken. *Arkansas Dept. of Health and Human Services v. Ahlborn*, 547 U.S. 268, 287 (2006) ("aspersions" unsupported by the record); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 486 n.3 (1986) (argument unsupported by the record and not presented to state court); *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) ("None of this is record evidence, and we do not consider it."); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 n.16 (1970) ("Manifestly, it [an unsworn statement of a witness not in the record of the proceedings below] cannot be properly considered by us in the disposition of the case.")

This case arises from a hearing on Petitioner Arnold M. Preston's Motion to Compel Arbitration and Respondent Alex E. Ferrer's Motion for a Preliminary Injunction. The factual presentation in the Superior Court was limited and tightly focused on whether Petitioner "solicited" or attempted to "procure" work for Judge Ferrer on television, acts which require a license under the California Talent Agencies Act ("TAA"). See, Appellant's Appendix before the Court of

Appeal ("A.A.") 1–253.

On the factual issue of "solicitation or procurement," Mr. Preston submitted a sworn declaration, *denying* the allegation. A.A. 103–105. Judge Ferrer submitted *no evidence* to support the allegation. Thus, it is misleading for Respondent's Brief to assert that certain matters are "undisputed," and then state that Mr. Preston "clearly and repeatedly sought to procure employment for Ferrer in the television industry. . . ." Respondent's Brief ("R.B.") 12. Actually, the allegation was *refuted* by Mr. Preston's declaration, so it was Mr. Preston's sworn *denial* which was effectively "undisputed" in the courts below.

A. Labor Commissioner Proceedings are Not "Expeditious"

The primary reason why private parties enter into arbitration agreements is to provide an expeditious and economical means of dispute resolution. For that reason, this Court stated, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 22 (1983):

> Congress's clear intent, in the Arbitration Act, [was] to move the parties to an arbitrable dispute out of court and into arbitration *as quickly and as easily as possible*. (Emphasis added)

Respondent repeatedly asserts, ipse dixit, that proceedings before the California Labor Commissioner

are "expeditious." R.B. 6, 15, 24, 34. Indeed, Judge Ferrer goes so far as to dispute the time estimate of the dissent (R.B. 34, n.7), where Justice Vogel criticized the majority for allowing Respondent "to cause a *delay of years* and triple or quadruple the parties' expenditures." Pet. App. 17a (emphasis added).

Labor Commissioner proceedings under the TAA are *not* "expeditious." Quite the contrary, they can, and often do, take *several years* to reach a determination at the administrative level. See, e.g., *James v. Thompson Management*, TAC 17-03 (36 months from filing to administrative decision); *Padilla v. Clymer*, TAC 60-94 (41 months); *Thomas Haden Church v. Ross Brown*, TAC No. 52-92 (24 months); *William Morris Agency, LLC v. O'Shannon*, TAC 06-05 (31 months); *Kilcher v. Vainshtein*, TAC 02-99 (28 months); *Patterson v. Black Orchid Entertainment*, TAC 39-05 (17 months); *Smith v. Harris*, TAC 53-05 (21 months); *Tyler v. Laugh Factory Management*, TAC 31-01 (51 months). The Labor Commissioner selectively publishes decisions at www.dir.ca.gov/dlse/DLSE-TACs.htm

Administrative proceedings under the TAA are merely a *prelude* to protracted and costly litigation in the courts. A good case in point is *Marathon Entertainment v. Blasi*, 45 Cal.Rptr.3d 158 (2006), in which the manager sued for fees on February 21, 2003. The defendant filed the inevitable Labor Commissioner petition, so there was an administrative hearing, which was followed by a de novo proceeding in the Superior Court, then a review in the Court of Appeal, followed by a review in the California Supreme Court.

The California Supreme Court heard oral argument on November 6, 2007, which means, as of this writing, that the case is now 4 years, 10 months old – and it is still not final. http://appellatecases.courtinfo.ca.gov (No. S145428)

If the California Supreme Court *affirms* the Court of Appeal in *Marathon,* the case will then be *remanded to the Labor Commissioner* for a new administrative hearing, followed by another de novo trial, and then another appeal. Hence, the aptly-named *"Marathon"* case may yet drag on for 10 years, or more, before reaching finality.

Compare that with arbitration. If Judge Ferrer had honored his promise to arbitrate, the hearing on the merits (including the TAA issue) would have taken place on January 26, 2006, less than *eight months* after Petitioner's June 4, 2005 arbitration demand. Joint Appendix ("J.A.") 7, 30.

The procedure established by the Court of Appeal in this case actually managed to make arbitration take longer, and cost more, than a court trial. The reason for that is, when an artist's manager files a lawsuit, the Superior Court will hear the breach of contract claim simultaneously with a *de novo* hearing of the TAA defense. *Styne v. Stevens,* 26 Cal.4th 42, 62 n.14 (2001)("Any appeal de novo from the Commissioner's decision. . .may, of course, be consolidated with the pending superior court contract action.")

Here, pursuant to the Court of Appeal's holding,

the parties must first go through an administrative procedure, followed by a de novo trial in the Superior Court, no doubt followed by another trek through the appellate courts, and then, once a final decision is rendered in the courts, the parties *may* be allowed to finally arbitrate. Unless, of course, there is a remand from the appellate courts, at which point the process will start all over again.

As Justice Vogel put it, in her dissent, "that is not how it is supposed to work."

B. De Novo Hearings are Conducted by the Superior Court

As part of his "expeditious" theme, Respondent repeatedly urges that the arbitrator in this case would have somehow regained his jurisdiction, conducted the *de novo* hearing, and made the final decision on the "validity or legality" of the contract. R.B. 2–6, 13–15, 24, 30–35, 44, 51.

In the courts below, Judge Ferrer took the *opposite* position, by consistently, vigorously and repeatedly urging that the Superior Court would hear the de novo appeal, and the arbitrator should *never* be allowed to rule on any issue.

In his Complaint in the Superior Court, filed November 2, 2005, Judge Ferrer prayed:

> That *the court* determine and declare that the existing controversy between Plaintiff [Ferrer] and Defendant

> [Preston] arising from the Contract, including in particular the issue of the validity of the Contract, *is not subject to arbitration*. . . .

J.A. at 29 (Emphasis added)

Likewise, in opposing Petitioner's Motion to Compel Arbitration, Judge Ferrer argued that the de novo hearing would be conducted *by the Superior Court*, not the arbitrator:

> [I]f, after conducting the forthcoming evidentiary hearing, the Commissioner rules that the Contract is void, Preston may appeal that ruling and have a hearing de novo *before this Court* on that issue....[U]nder the Act, *this Court would acquire jurisdiction* over the parties' dispute as to the validity of the Contract only after the Labor Commissioner has heard and decided that dispute and the losing party has appealed within 10 days after the determination.
>
> ....
>
> [I]f the losing party chooses to appeal the Commissioner's decision entered after that hearing, he has the right to *appeal to this Court*, which will hear and decide the issue de novo, at which time Preston may again present evidence in support of his assertions going to the merits of Ferrer's contract invalidity argument.

A.A. at 157 n.1, 163–164 (Emphasis added).

Under the Court of Appeal's ruling, the chance the de novo hearing will be conducted by the arbitrator is *nil*. For one thing, California law expressly provides that *the Superior Court* conducts the de novo hearings, after a determination by the Labor Commissioner. As stated in Labor Code §1700.44(a):

> In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, *to the superior court* where the same shall be heard de novo." (Emphasis added)

Since the Court of Appeal ruled on *jurisdictional* grounds, and cited Labor Code §1700.44 as giving the Labor Commissioner "exclusive" jurisdiction to hear TAA issues (Pet. App. 5a–6a), and since Labor Code §1700.44 also vests jurisdiction in the Superior Court to conduct the de novo hearing, it is perfectly clear that the Court of Appeal's decision diverted this case from the arbitrator onto a circuitous "track" which led, via the Labor Commissioner, right back into the court system.

Moreover, the 10-day appeal period in Labor Code §1700.44 is jurisdictional. If the losing party fails to file a notice of appeal *in the Superior Court* within 10 days, the Labor Commissioner's determination becomes a binding judgment. Labor Code §§ 98.2(d),

1700.44(a); *REO Broadcasting Consultants v. Martin*, 69 Cal.App.4th 489, 495 (1999); *Sinnamon v. McKay*, 142 Cal.App.3d 847 (1983). See, also, *Buchwald v. Superior Court*, 254 Cal.App.2d 347 (1967), sub nomine *Buchwald v. Katz*, 8 Cal.3d 493 (1972)(arbitrator enjoined; hearing de novo under Labor Code §1700.44 to be conducted by the Superior Court).

If Mr. Preston had not appealed, and chose instead to defend before the Labor Commissioner, the arbitrability issue would have been *waived*, because an order denying arbitration is immediately appealable. See, California Code of Civil Procedure §1294(a); 9 U.S.C. §16(a); *Cotton v. Slone*, 4 F.3d 176, 179–80 (2nd Cir. 1993)(failure to timely appeal denial of motion to compel arbitration, together with active litigation activity, waived right to appeal denial of arbitration).

Moreover, if the U.S. Supreme Court had not granted certiorari, the anti-arbitration holding of the Court of Appeal would have been not just the Law of the Case, but *controlling* law in California.

(Even without a Law of the Case problem, there was never going to be a *second* Motion to Compel Arbitration, because California imposes severe sanctions, including *contempt of court*, on attorneys who try for "a second bite at the apple" without a showing of "new or different facts." California Code of Civil Procedure §§ 1008(a), (b), (d).)

Judge Ferrer's *new* position, that the Labor Commissioner proceeding would have (or might have) been followed by an immediate arbitration, is further

belied by his procedural maneuvering in the courts below, leading up to the events of December 6, 2005 and December 7, 2005:

On October 12, 2005, the arbitrator denied Judge Ferrer's motion for a stay and held that he had jurisdiction to arbitrate the validity or legality of the contract under the TAA. J.A. 24–25. In his written opinion, the arbitrator specifically cited Labor Code §1700.45 and *Styne v. Stevens*, 26 Cal.4th 42, 58 n.9 as *allowing* the parties to arbitrate contract-legality issues under the TAA. *Id.*

Pursuant to *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the jurisdictional dispute should have ended right there. Simply put, under the FAA, *the arbitrator had jurisdiction to decide arbitrability*, he made his ruling, and the next step *should* have been an arbitration on the merits.

Instead, on November 2, 2005, Judge Ferrer filed this lawsuit, seeking an injunction against the arbitration. As quoted above, his Complaint sought a declaration by the Superior Court that the entire contract was void, and based thereon, he sought to *enjoin* the arbitrator who had already ruled against him. J.A. 26–29.

The hearing on Judge Ferrer's injunction motion was set for December 7, 2005. One day before the injunction hearing, on December 6, 2005, Respondent brought a reconsideration motion to the arbitrator. With the injunction looming the *next day*, the arbitrator reconsidered and stayed his own arbitration

proceeding, noting that "it is not cost effective to have parallel proceedings simultaneously pending. . . ." J.A. 38.

The reconsideration reaffirmed the arbitrator's own jurisdiction, but stated that he would wait for the Labor Commissioner to make what would have been, in substance and practical effect, an *advisory* ruling. J.A. 38.

On December 6, 2005, after the arbitrator's reconsideration order, Judge Ferrer could have withdrawn his injunction motion, proceeded to the Labor Commissioner for an advisory ruling, then returned to the arbitrator for a final decision. Instead, the next day, December 7, 2005, Judge Ferrer proceeded with his injunction motion, and obtained the anti-arbitration injunction which is now before this Court.

Judge Ferrer's strategy was to file collateral attacks against the arbitration, and use the injunction to cause years of delay. He achieved his goal, and would have vigorously opposed any attempt to reinstate the arbitration.

The purpose of an arbitration agreement is to provide an expeditious, economical, and efficient means for adjudicating disputes. The moment he filed this lawsuit, Judge Ferrer *dishonored* his contractual promise to arbitrate and deprived Mr. Preston of the "benefit of the bargain."

As this Court has noted, allowing one party to

ignore the contract and resort to the courts "could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984).

C. Arbitration Will Adequately Protect Those Covered by the Talent Agencies Act

Much of the presentation by Respondent and his amici centers on a public policy argument, that the TAA supposedly protects "vulnerable individuals" who need special protection, and they will supposedly not get it if required to arbitrate.

This Court has considered this argument before, and found that arbitration is an adequate method for resolving civil claims based on statutes, since the aggrieved party still has the right to file a grievance with the applicable government agency. *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 27–28 (1991)(aggrieved party may file a grievance with the EEOC, but must *arbitrate* any monetary claim against an employer because "[w]e do not perceive any inherent inconsistency between those [public] policies . . .and enforcing agreements to arbitrate...."); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002)(government agency may file action in its own name, notwithstanding private agreement to arbitrate). See, also, *E.E.O.C. v. Cosmair, Inc.*, 821 F.2d 1085, 1089–1090 (5th Cir. 1987) (employee retains right to file a grievance with the EEOC, even after signing a release.).

Another problem with Respondent's public policy argument is, California *repealed* the licensing requirement for "artist's managers" in 1978. Since then, only "talent agents" (who collect and handle large sums for their clients) are required to get licenses. TAA, Labor Code §1700, *et. seq.* Thus, for almost 30 years, artist's managers like Mr. Preston have *not* needed a license in California. *Waisbren v. Peppercorn Productions, Inc.*, 41 Cal.App.4th 246, 252 (1995)("Unlike a talent agent, a 'personal manager' is not covered by the Act or any other statutory licensing scheme.")

In 2001, the California Supreme Court explained the difference between talent agents (who must have licenses) and managers (who are not required to have licenses) in *Styne v Stevens*, 26 Cal.4th 42, 50-51 (2001):

> [The Talent Agencies] Act's definition of a talent agency is narrowly focused on efforts to secure professional 'employment or engagements' for an 'artist or artists.' (§1700.4, subd. (a).) Thus, it does not cover other services for which artists often contract, such as personal and career *management* (i.e., advice, direction, coordination, and oversight with respect to an artist's career or personal or financial affairs) . . .nor does it govern assistance in an artist's business transactions other than professional employment. (Emphasis in

original)

Prior to 1978, "artist's managers" required licenses in California, but in 1978, the California Legislature *de-regulated artist managers*, exempting them from the licensing requirement. Calif. Stats. 1978, Ch. 1382, §6, amending Labor Code §1700.4(a). Prior to the 1978 legislation, the statute was titled the "Artist's Managers Act," and managers *were* required to have licenses. The1978 amendment renamed it the "Talent Agencies Act," and for the past 30 years, *only talent agents* have been required to have licenses.

Four years after the deregulation, in 1982, the Legislature assigned the California Entertainment Commission ("CEC") the task of studying the de-regulation, and the CEC reported on December 2, 1985 that the de-regulation of artist's managers was a *success*. In its report, the CEC specifically recommended *against* reinstating the license requirement for artist's managers:

> There is no need to license personal managers. . .[and] [t]here is no rationale or practical justification for the enactment of a law requiring the licensing of personal managers. . . . ¶There is no justification for licensing personal managers. It is not, in fact, the person who is being licensed by the Talent Agencies Act; rather, it is the activity of procuring employment.

Entertainment Industry Commission Report of

December 2, 1985, at 30–31 (A.A. 145, 151-152).

Talent agents (also known as "booking" agents) usually have a long client list and many of them have minimal client contact. Except for the elite talent agents, they tend to operate a volume business, sending large numbers of clients out on auditions, collecting the clients' salaries, taking their commissions, and offering little in the way of career guidance. Since the talent agencies *handle a lot of client money*, they are required to maintain trust accounts, and to obtain a license they must provide fingerprints, character references, and a $50,000 bond. Labor Code §§ 1700.5 – 1700.22.

By contrast, artist's managers (also known as "personal" managers) do not "book" engagements and they normally do *not* collect and handle client money. (See, Mr. Preston's management contract, which provides that client funds will be handled by a third-party business manager. J.A. 14–15.) Most managers have only a handful of clients, and sometimes they have only *one* client. Managers are "full service" client advisors, providing consultation, career advice, guidance, counseling and administration. No license is required to perform these advisory functions.

Artist's Managers *work hard* for their fees by assisting in the selection, firing and supervising of talent agents, business managers, and lawyers; "coaching" clients on how to dress, behave, interview, audition, and interact with producers, directors, and journalists; and helping clients make critical, strategic career decisions, such as which roles to accept and

which acting jobs to turn down. *Waisbren*, supra, 41 Cal.4th at 252–253.

Managers also help protect their clients from the "dark side" of Hollywood, including stalkers, extortionists, and embezzlers, and often serve *in loco parentis*, making sure the client makes it to the set on time, steering troubled clients into rehabilitation, organizing "drug interventions" for the ones who won't get treatment willingly, and keeping (or bailing) their troubled clients out of jail.

Contrary to the assertion in Respondent's Brief, artist's managers are *allowed* to negotiate artist contracts, if they have the consent of the talent agent. Labor Code §1700.44(d). Additionally, a lot of artist's managers, including Petitioner Arnold M. Preston, are also *attorneys*, who can negotiate on behalf of clients in their capacity as duly-licensed members of the bar.

In a case, like this one, which involves the William Morris Agency ("WMA"), the largest talent agency in the world, the most important function the lawyer-manager performs is to provide *independent counsel* to the client. To fully appreciate the need for this service, the Court should be familiar with two terms of art in the television industry: the "packaging fee" and the "hip pocket client."

WMA discloses, in its amicus brief, that it collects a "packaging fee" from the producers of the *Judge Alex* television show, consisting of 5% of gross revenues. Amicus Brief of William Morris Agency ("W.M.A. Brief") 5. Obligingly, WMA also provides this

explanation of what that is:

> WMA "packages" the different elements and constituents for successful television programming and content: actors, directors, producers, writers and show concepts. . . .¶WMA receives a "series packaging fee" for this television program, consisting of 5% of gross receipts, which is the standard commission on first run syndication.

W.M.A. Brief 4-5

Curiously, WMA's brief then goes on to make the assertion that "Judge Alex Ferrer was never a William Morris client." W.M.A. Brief 5. This peculiar, uncited averment (which Petitioner disputes) poses an important question: Since *Judge Alex* is a generic "TV judge" format, and the personality of the Hon. Alex E. Ferrer was the only bona fide "element," if WMA did not "represent" Judge Ferrer, how did it wangle a lucrative packaging fee on his syndicated television program?

The answer is, Respondent was a "hip pocket" client of the agency, an ambiguous status where a talent agency books the client for an audition or interview, but refrains from executing a written agency agreement. Under this "hip pocket" arrangement, it was WMA which "solicited and procured" Respondent's engagement on *Judge Alex*, and that gave WMA control over the key "element," i.e., they had Respondent in their "hip pocket." It was

this *control* over the submission of Respondent to the producers which gave WMA the *leverage* to exact a multi-million dollar "package fee," an arrangement which will last for the life of the program, and is very likely to yield more income to WMA than Judge Ferrer makes in salary.

Savvy artists who find themselves in "hip pocket" status quickly realize they need *independent counsel*, so they hire a lawyer, or a manager. In the case of Judge Ferrer, who is one of the more savvy "artists" to migrate to Hollywood in a long time, he hired Arnold M. Preston, Esq., whom he knew was *both* a lawyer *and* a manager. (Contrary to Judge Ferrer's unsworn allegation, when he found out that Mr. Preston was leaving the William Morris Agency, he *asked* Petitioner to manage him, and he was *not* pressured to sign the contract.)

"Package fees" have been sharply criticized. As explained in D. Zelenski, Note, *Talent Agents, Personal Managers, and Their Conflicts in the New Hollywood*, 76 Southern California Law Review 979, 999–1000 (2003):

> [B]ecause packaging agents effectively act as producers, they necessarily face a conflict of interest.
>
> Agents function as packagers when they put together teams of clients – for example, writers, directors, and actors – and sell those teams to employers for percentage fees instead of commissioning

> each separate client's deal individually . . . . Agents can charge such high amounts because, as described above, franchise agreements only restrict amounts that *clients* can be charged, not amounts that *employers* can be charged.
>
> . . . .
>
> This conflict of interest effectively goes unremedied under the traditional regulatory scheme. Aggrieved clients can attempt to have their representation contracts rescinded on the ground that their agents have violated some type of fiduciary duty, but as discussed above, most would choose not to, presumably out of a concern that if they did speak out, they would brand themselves as troublemakers and so make it difficult to obtain future representation.

The amount of money involved in "packaging fees" explains why the talent agents are eager to self-deal – and why they are not eager to have their "hip pocket" clients retain independent counsel. For example, WMA reportedly made "packaging" fees on the *Cosby* show in excess of $100,000,000, merely by introducing Bill Cosby to the producers. J. Horn, *TV Package Deals Leave Agencies Awash in Riches*, Chicago Tribune, September 26, 1989 (1989 WLNR 2533775). Likewise, WMA and the other "major" talent agencies have reportedly made "packaging" fees in the eight-figure range on such programs as *Friends* ($50,000,000), *Roseanne* ($25,000,000), and *Murphy Brown* ($25,000,000). See, S. Hofmeister, *Company*

Town: For CAA and Television, It's One Step Forward and Two Steps Back, Los Angeles Times, November 7, 1995 (1995 WLNR 4847211); A. Frutkin, *Agents of Change*, Media Week (USA), March 22, 1999 (1999 WLNR 7803870).

This is the context in which Judge Ferrer, and his amici, argue that "vulnerable individuals" need special protection against the perils of *arbitrating* with their personal managers. Suffice it to say, there was a very good reason why the California Legislature deregulated the personal managers 30 years ago, but to this day California law still requires the *talent agents* to be bonded, licensed, and *fingerprinted.*

D. The Court of Appeal's Circular Reasoning is Preempted

The Court of Appeal's "exhaustion" requirement imposed a condition precedent to arbitration which is purely a judge-created rule, because the TAA specifically exempts arbitration from the exhaustion requirement. Labor Code §1700.45 states, in relevant part:

> If there is an arbitration provision in a contract, the contract need not provide that the talent agency agrees to refer any controversy between the applicant and the talent agency regarding the terms of the contract to the Labor Commissioner for adjustment, and Section 1700.44 shall not apply to controversies pertaining to the contract.

Thus, while Respondent and the Court of Appeal speak in terms of Petitioner's obligation to "exhaust" administrative remedies, Mr. Preston never had any such obligation; the sole issue referred to the Commissioner was a *defense*, asserted by Respondent. J.A. 20–23, 26–29. And that defense consisted of an assertion that *the entire contract was void*, under the TAA. J.A. 20–23, 26–29. And that is why the issue now comes before this Court, because under the FAA, arbitration agreements are severable, and Judge Ferrer's attack on the *entire contract* is arbitrable. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

Respondent makes an extensive argument about the details of the anti-arbitration statute, but the Court of Appeal's interpretation of a California statute is not at issue here. What is before this Court is the fact that the strained statutory reasoning of the lower court gave effect to a lingering judicial bias against arbitration. To divert the "validity and legality" issue away from the arbitrator, the Court of Appeal held, as its primary reason, that Labor Code §1700.44 grants exclusive jurisdiction to the Labor Commissioner. The Court of Appeal then construed the above-quoted "saving" clause, Labor Code §1700.45, a provision which, by its terms, only applies to talent agents, as not applying to artist's managers. (As part of the 1978 de-regulation of artist managers, Labor Code §1700.45 was amended and the term "artist's managers" was deleted and replaced with the term "talent agency." West's Annotated Code, Labor Code §1700.45.)

To achieve the desired result, the Court of

Appeal employed a roundabout theory that Petitioner, although an artist's manager and not subject to Labor Code §1700.45, has been *accused* of violating the TAA, and that accusation triggers the TAA because he may have been a *de facto* talent agent, but Mr. Preston does not benefit from the "saving" clause because he is *not* a talent agent, and therefore he cannot arbitrate the issue of whether, in fact, he acted unlawfully as a de facto talent agent.

In her dissent, Justice Vogel criticized this reasoning as *circular*:

> [In] *Styne v. Stevens*, [26 Cal.4th 42, 54-56, n.9 (2001)] the [California] Supreme Court expressly rejected an argument that its holding would undermine. . . arbitration. . .noting that "[n]othing in [its] reasoning restricts" the parties' right to provide in their contract that their disputes shall be resolved by private arbitration rather than by the Commissioner. (*Id.* at p. 59, fn. 9.)
>
> My colleagues, *assuming their own conclusion*, dismiss this language on the ground that the arbitration provision before us does not conform to the Talent Agencies Act's requirements as set out in Labor Code section 1700.45. (Maj. opn., p. 6, fn. 2.) Their approach ignores the fact that the parties signed a "Personal Management Contract," not a Talent Agent's Contract, and the only reason the

> Talent Agencies Act is relevant is that Ferrer claims the agreement is not what it appears to be and that Preston was in fact acting as an unlicensed talent agent. Based on the parties' agreement, this threshold issue -- which quite plainly has to do with the "validity" and "legality" of the contract -- must be decided by the arbitrator, not the Commissioner or the trial court. (Cf. *Buckeye Check Cashing, Inc. v. Cardegna* (2006) [546 U.S. 440]; *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444.)

Pet. App. 15a (Emphasis added)

Since virtually every effort by an artist's manager to collect fees in California is greeted by a TAA defense, the practical effect of the Court of Appeal's ruling is that the entire profession of artist's managers has effectively lost the right to arbitrate.

Moreover, the Court of Appeal has implemented a *per se* rule, because there was *no evidence* before the Superior Court to support the allegation Petitioner had violated the TAA. Indeed, the only evidence before the lower courts was the uncontradicted Declaration of Arnold M. Preston, who attested that he did *not* violate the statute. A.A. 103–105. In other words, pursuant to the holding of the Court of Appeal, the manager loses the right to arbitrate as soon as a "colorable" accusation of a TAA violation is made, and it makes no difference whether the allegation is supported by evidence, nor does it make any difference if the

manager proves, as part of a motion to compel arbitration, that the allegation is *false*.

Petitioner submits that the Court of Appeal's holding is preempted by the FAA. As stated in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996):

> Courts may not. . .invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. See *Allied-Bruce*, 513 U.S., at 281, 115 S.Ct., at 843; *Perry*, 482 U.S., at 492, n. 9, 107 S.Ct., at 2527, n. 9. By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed "upon the same footing as other contracts." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S.Ct. 2449, 2453, 41 L.Ed.2d 270 (1974) (internal quotation marks omitted). Montana's § 27-5-114(4) directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus *displaces* the Montana statute with respect to arbitration agreements covered by the Act. (Emphasis added)

E. *Volt* and *Mastrobuono*

Respondent cites and relies heavily on *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989). Petitioner respectfully submits the relevant precedent is *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), since *Volt* is inapposite, for several reasons:

First, *Volt* was a multi-party litigation, in which some of the warring factions were not bound by the arbitration agreement. The pendency of the *third party* litigation was critical in *Volt*, because this Court's affirmance was based on a theory that California Code of Civil Procedure §1281.2(c) was incorporated into the contract, and that Code section only applies when "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a *third party*, arising out of the same transaction or series of related transactions...." (Emphasis added)

Cf., *Cronus Investments, Inc. v. Concierge Services*, 35 Cal.4th 376, 383, 385, 392 (2005)(The presence of *third parties* in litigation avoids preemption under *Volt*. The FAA has no provision dealing with the "multiparty dispute" problem, so there is no conflict with state law.).

Here, there are no unbound "third parties." Both of the collateral proceedings were filed by Judge Ferrer, to disrupt and terminate the arbitration. Since he is signatory to the agreement to arbitrate, filing those collateral actions was a breach of the contract.

Volt is simply not applicable, because it only applies when there is an intertwined and potentially conflicting litigation with *third parties* who have never agreed to arbitrate.

Second, the ratio decidendi in *Volt* was the "intent of the parties" as to a subject (the power of the court to stay pending resolution of the third-party litigation) on which the contract was *silent*. After drawing an inference from the choice-of-law clause, the *Volt* decision reiterated that "Congress' principal purpose" in enacting the FAA was "ensuring that private arbitration agreements are enforced according to their terms....." *Volt*, 489 U.S. at 478.

Here, the contract has an *express term* that the parties will arbitrate the "validity or legality" of the contract. J.A. 18. Thus, Respondent argues that the Court should extend *Volt* and infer an intent on the part of Messrs. Preston and Ferrer to *negate an express term of the agreement to arbitrate.*

This tortured reading of the contract clashes with the fundamental principal of contract law that an *express* term of a contract trumps an *implied* term. As stated in *Lincoln Electric Company v. St. Paul Fire and Marine Insurance Company*, 210 F.3d 672, 684 (6th Cir. 2000):

> There can be no implied promises in a contract in relation to any matter that is specifically covered by the written terms of the contract.

See, also, *Corso v. Creighton University*, 731 F.2d 529, 533 (8th Cir. 1984) ("It is also axiomatic that where general and specific terms in a contract may relate to the same thing, the more specific provision should control.").

Moreover, under the FAA "any doubts concerning the scope of arbitrable issues is to be resolved in favor of arbitration. . . ." *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 24–25 (1983).

Petitioner submits that the proposed extension of *Volt* to *contradict* an express agreement to arbitrate "validity or legality" of the contract flies in the face of these well-established principles. See, 11 *Williston on Contracts (4th Ed, 1999)* §32:10 ("Where general and specific clauses conflict, the specific clause governs the meaning of the contract."); *MBIA Ins. Corp. v. Royal Indem. Co.*, 426 F.3d 204, 210 (3rd Cir. 2005) (ALITO, J.)(Words in a contract should be given their ordinary meaning and should not be "tortured" to impart ambiguity where none exists). See, also, California Code of Civil Procedure §1856(a); California Civil Code §1638, 1639; *Dore v. Arnold Worldwide, Inc.* 39 Cal.4th 384, 389–391 (2006) (clear and unambiguous contract language governs).

Another major difference between *Volt* and this case is, *Volt* was strictly a question of procedural priority, and it did not involve an attempt to divert a *particular issue* away from the arbitrator and send it to another tribunal.

In *Volt*, the stay was to break up a litigation log jam, and impose "the efficient order of proceedings" in a case where the arbitrator lacked jurisdiction to decide the whole case. Here, by contrast, the sole purpose of the stay was to *divert a particular issue away from the arbitrator*, for a decision by other tribunals.

Petitioner submits that Judge Ferrer's proposed extension of *Volt* is not just illogical, it is inconsistent with *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63–64 (1995), where this Court stated:

> We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read "the laws of the State of New York" to encompass *substantive principles* that New York courts would apply, but not to include special rules limiting the authority of the arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other. In contrast, respondents' reading sets up the two clauses in conflict with one another; one foreclosing punitive damages, the other allowing them. This interpretation is untenable. (Emphasis added)

Respondent's argument sets up a similar conflict, asserting that the choice-of-law provision impliedly negates the express agreement to arbitrate

the "validity or legality" of the contract. Even if that was a reasonable interpretation of the choice-of-law clause (which Petitioner disputes), under well-settled and universal rules of contract interpretation, the *specific* term should prevail over any theory of implied intent.

F. Express Preemption of State Law Under 9 U.S.C. §2

Federal preemption applies whenever state law presents an obstacle to achieving the objectives of Congress. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000). State law is also preempted when it is an impediment or frustrates the purpose of the Federal statute. *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 873–885 (2000). See, also *Fidelity Federal Savings and Loan Association v de la Cuesta*, 458 U.S. 141, 156 (1982)(Federal regulation displaces state law which hinders accomplishment of the Federal goals).

Express preemption applies, because this Court has expressly found that 9 U.S.C. §2 *displaces* state laws which impede or present an obstacle to accomplishing Congress' goal and purpose of making arbitration agreements enforceable according to their terms. *Doctor's Associates*, supra, 517 U.S. at 683, 687. As this Court explained in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273, 275 (1995):

> The Federal Arbitration Act, § 2, provides

> that a "written provision in any... *contract evidencing a transaction involving commerce* to settle by arbitration. . .shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."
>
> . . . .
>
> [T]his Court has previously described the Act's reach expansively as coinciding with that of the Commerce Clause. See, e.g., *Perry v. Thomas*, 482 U.S. 483, 490, 107 S.Ct. 2520, 2525-26, 96 L.Ed.2d 426 (1987) (the Act "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause"); *Southland Corp. v. Keating*, 465 U.S., at 14-15, 104 S.Ct., at 860 (the "'involving commerce'" requirement is a constitutionally "necessary qualification" on the Act's reach, marking its permissible outer limit); see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S., at 407, 87 S.Ct., at 1807-08 (Harlan, J., concurring) (endorsing *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 407 (CA2 1959) (Congress, in enacting the FAA, "took pains to utilize as much of its power as it could")).

Respondent argues that California's "police power" is threatened by this case, because the TAA is a licensing statute. R.B. 38. Since, as noted above, the

California Legislature specifically *exempted* artist's managers from the TAA almost 30 years ago, there is no such threat.

More to the point, Petitioner is *not* challenging a licensing statute, only an *anti-arbitration holding* which is based on the Court of Appeal's strained reading of a provision in that statute. Despite Respondent's effort to re-mold the Question Presented as a test of whether the licensing statute is preempted, all that is at stake here is whether Respondent will have to adjudicate his TAA defense in the arbitral forum he agreed to.

G. *Southland Corporation v. Keating*

Respondent asks this Court to overrule *Southland Corp. v. Keating*, 465 U.S. 1 (1984), a proposal which actually entails overturning a number of this Court's cases, to say nothing of the hundreds of lower court cases based on that decision. Thus, Respondent also asks the Court to overrule its decision in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 272 (1995), where this Court stated:

> [R]espondents, supported by 20 state attorneys general, now ask us to overrule *Southland* and thereby to permit Alabama to apply its antiarbitration statute. . . .Nothing significant has changed in the 10 years subsequent to *Southland*; no later cases have eroded *Southland's* authority; and no unforeseen

> practical problems have arisen. Moreover, in the interim, private parties have likely written contracts relying upon *Southland* as authority. Further, Congress, both before and after *Southland*, has enacted legislation extending, not retracting, the scope of arbitration. See, e.g., 9 U.S.C. §15 (eliminating the Act of State doctrine as a bar to arbitration); 9 U.S.C. §§ 201–208 (international arbitration). For these reasons, we find it inappropriate to reconsider what is by now well-established law.

By seeking a reversal of *Southland*, Respondent also asks this Court to overrule its decision in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105,112 (2001), which held:

> We had occasion in *Allied-Bruce*, supra, at 273-277, 115 S.Ct. 834, to consider the significance of Congress' use of the words "involving commerce" in § 2. The analysis began with a *reaffirmation* of earlier decisions concluding that the FAA was enacted pursuant to Congress' substantive power to regulate interstate commerce and admiralty, see *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), and that the Act was applicable in state courts and pre-emptive of state laws hostile to

> arbitration, see *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984). (Emphasis added)

See, also, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006):

> We *reaffirm* today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." (Emphasis added)

Despite the 23-year history of *Southland*, Respondent argues for an abrupt reversal of this well-settled doctrine, just two years after the Court expressly reaffirmed it by a 7-1 vote. This argument ignores the fact that this Court has long recognized that the doctrine of stare decisis is of fundamental importance to the rule of law. As stated in *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 202 (1991):

> Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done. . . .Congress has had almost 30 years in which it could have corrected our decision. . .if it disagreed with it, and

has not chosen to do so.

Adherence to precedent promotes stability, predictability, and respect for judicial authority, which is why this Court has said that it "will not depart from the doctrine of stare decisis without some compelling justification. . . ." *Id.*, 502 U.S. at 202.

"Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved. . . ." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). See, also, *Federal Election Commission v. Wisconsin Right To Life, Inc.*, ___ U.S. ___, 127 S.Ct. 2652, 2686 (2007)(SCALIA, J. concurring in part)(stare decisis analysis should give consideration to "property or contract rights, where reliance interests are involved.").

Petitioner submits that, over the past 23 years, the business community has come to rely on *Southland*, and fashioned contracts based on such reliance. Given this Court's reaffirmation of *Southland* in *Allied-Bruce*, *Circuit City*, and *Buckeye*, Respondent simply has not provided the kind of compelling justification which would justify overturning such a well-settled doctrine.

Finally, Petitioner respectfully submits that overruling *Southland* would lead to a patchwork of anti-arbitration doctrines among the several states, and that, in turn, would result in differing rules of decision, depending on whether the same case was heard in Federal or state court. This would cause a

rush to file petitions to compel arbitration in the U.S. District Courts, and a dramatic increase in removals of such cases from the state courts. In addition to the burden which this would impose on the Federal judiciary, overruling *Southland* would result in an erosion of confidence in the law, resulting from the inevitable forum shopping, which this Court sharply disapproved of in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 74–75 (1938).

CONCLUSION

The Court of Appeal should be *reversed*, and the case should be remanded with an instruction to *vacate* the injunction, *grant* the motion to compel arbitration, and award *costs* to the Petitioner.

Respectfully submitted,

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IN THE
Supreme Court of the United States

ARNOLD M. PRESTON,

Petitioner,

v.

ALEX E. FERRER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent Alex E. Ferrer ("Ferrer") has filed an Opposition, asking the Court to deny review. Petitioner respectfully submits the following rebuttal to Respondent's principal contentions.

ARGUMENT

1. The opening sentence of the Opposition asserts that "[t]he decision of the court below does not undermine the viability of arbitration provisions in contracts involving interstate commerce...." (Opp. at 1)

The fate of Petitioner's arbitration demand in this case belies that argument, since the hearing was scheduled for January 26, 2006 and this entire case would have been arbitrated 18 months ago, but for the Superior Court's December 7, 2005 *injunction halting the arbitration*, which remains in full force and effect. (Pet. App. 4a)

2. The Opposition downplays this case as "California-centric" (Opp. at 7), only of interest "to those who function in the California entertainment industry...." (Opp. at 6)

Actually, the California Labor Commissioner routinely asserts "long arm" jurisdiction over personal managers *nationwide.*

Breuer v. Top Draw Entertainment, Inc. (1996) TAC 18-95 (published at www.dir.ca.gov/dlse/DLSE-TACs.htm), is a case in point. In that case, the California Labor Commissioner assumed jurisdiction to determine the legality of a personal management contract between a New York manager and a New York artist, which was executed in New York. The ground cited for assuming jurisdiction was, the

New York manager, at one point in the relationship, escorted his New York client to California for an entertainment industry "showcase."

The Labor Commissioner did not balance the "governmental interests" of New York against California in *Breuer,* nor give any consideration to choice of law principles. Rather, the Commissioner applied the "minimum contacts" standard of *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154 (1946). Since the personal manager *briefly* conducted business in California, the Labor Commissioner assumed jurisdiction to determine the legality of the New York management contract.

Any successful entertainment career is likely to involve engagements in California sooner or later. Hence, the anti-arbitration holding in this case, taken together with the Labor Commissioner's use of "minimum contacts" as the standard for asserting jurisdiction over out-of-state personal managers, means that personal managers *nationwide* have been stripped of their right to arbitrate contract disputes with their clients.

In the present matter, the "Artist," Judge Ferrer, is a resident of Florida and tapes his television program in Texas. (Pet. App. 11a) Thus, when the Labor Commissioner held that she had jurisdiction to hear Mr. Ferrer's case (Pet. App. 10a), she was imposing the California Labor Code in a case where the "laborer" neither resided nor worked in California. The Court of Appeal expressly *affirmed* this aggressive, extraterritorial application of the California Labor Code. (Pet. App. 11a)

As such, this case is not as "California-centric" as Respondent asserts.

Moreover, the Opposition fails to properly address the argument that, if certiorari is denied, then *Ferrer v. Preston* (2006) 145 Cal.App.4th 440, 51 Cal.Rptr.3d 628 will be cited in other states to distinguish, and undermine, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204 (2006).

3. The Opposition argues that "the issue of whether the de novo hearing will be conducted by a court or an arbitrator has not yet been litigated...." (Opp. at 5)

Neither party has previously raised this "issue." Why not? Because the California statute is crystal clear: *de novo* appeals from the Commissioner are heard by the Superior Court. As stated in the California Talent Agencies Act, Labor Code §1700.44(a):

> "In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, *to the superior court* where the same shall be heard de novo." (Emphasis added)

4. The Opposition republishes Mr. Ferrer's *ipse dixit* accusation that Mr. Preston acted illegally as a talent agent without a license. (Opp. at 3) Actually, personal managers do *not* need licenses in California, and Judge Ferrer has yet to adduce a scintilla of evidence that Mr. Preston has done anything unlawful.

The legal distinction between "personal managers" and "talent agents" was explained in *Styne v. Stevens* (2001) 26 Cal.4th 42, 50-51:

> "[The Talent Agencies] Act's definition of a talent agency is narrowly focused on efforts to secure professional 'employment or engagements' for an 'artist or artists.' (§1700.4, subd. (a).) Thus, it does not cover other services for which artists often contract, such as personal and career *management* (i.e., advice, direction, coordination, and oversight with respect to an artist's career or personal or financial affairs)...nor does it govern assistance in an artist's business transactions other than professional employment." (Emphasis in original)

Mr. Preston is a *manager*. (Pet. App. 3a) Since California law does *not* require him to have a license to act in that role, Judge Ferrer alleged that Mr. Preston illegally solicited and procured employment for Ferrer (Opp. at 3), since those activities *do* require a talent agency license.

However, no evidence at all was adduced by Judge Ferrer in support of this bare allegation (Pet. App.17a), whereas Mr. Preston filed a declaration in the Superior Court *denying* under oath that he solicited or procured.

The *dearth of evidence* submitted by Mr. Ferrer was noted by Court of Appeal Justice Miriam Vogel in her *dissent:*

> "There is yet another reason to reverse. Ferrer established his 'colorable' defense under the Talent Agencies Act by argument, not by evidence, and the trial court then relied on the existence of this defense to support its decision to issue a preliminary injunction staying the arbitration proceedings. Put another way, there is no evidence at all to support issuance of the preliminary injunction, and this fact

> alone requires reversal. (*San Francisco Newspaper Printing Co. v. Superior Court* (1985) 170 Cal.App.3d 438, 441-442 [a preliminary injunction must be supported by evidence establishing the moving party's probability of success on the merits]; *Higgins v. Superior Court, supra,* 140 Cal.App.4th at p. 1249 [the party opposing a petition to compel arbitration bears the burden of proving by a preponderance of evidence any facts necessary to his defense].)" (Pet.App. 17a)

The Opposition glosses over this aspect of the case by characterizing the accusation of illegal conduct as Mr. Ferrer's "*contention.*" (Opp. at 3) Having pointed the accusing finger at Mr. Preston, Judge Ferrer has yet to back it up with *any evidence at all.* As such, that is all it is: a naked accusation, with no evidence in the record to support it.

Since Petitioner's contractual right to arbitrate was negated by the California Courts without any evidence of illegality, a bad precedent was set, *a per se* rule that all an artist has to do is *accuse* the manager of violating the Talent Agencies Act and an arbitration can thereby be automatically *derailed for years*, while the matter works its way through the Labor Commissioner, the Superior Court, and the California appellate courts.

Since the California Labor Commissioner has, in effect, assumed a *nationwide jurisdiction* in this field, neither the personal manager nor the artist has to be from California for this tactic to work, and the public policy favoring arbitration of disputes has been undermined.

CONCLUSION

The Court of Appeal's decision in this case is directly at odds with *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204 (2006) and the Federal Arbitration Act.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH D. SCHLEIMER
SCHLEIMER & FREUNDLICH LLP
9100 Wilshire Boulevard
Suite 615 -East Tower
Beverly Hills, California 90212
(310) 273-9807

Counsel of Record for Petitioner

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53074
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No. 06-1463

IN THE
Supreme Court of the United States

ARNOLD M. PRESTON,

Petitioner,

v.

ALEX E. FERRER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

JOINT APPENDIX

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Petition for Certiorari Filed May 4, 2007
Certiorari Granted September 25, 2007

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11/2/2005	Complaint
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11/8/2005	MOTION TO COMPEL ARBITRATION. Filed by Attorney for Defendant.
11/10/2005	MOTION FOR PRELIMINARY INJUNCTION. Filed by Attorney for Plaintiff [Alex E. Ferrer].
11/10/2005	Declaration of Robert M. Dudnik in Support of Notice of Motion for Preliminary Injunction. Filed by Attorney for Plaintiff.
11/22/2005	Memorandum of Points & Authorities in Opposition to Motion to Compel Arbitration. Filed by Attorney for Plaintiff.
11/22/2005	Notice of Errata in Connection with the Declaration of Robert M. Dudnik in Support of Notice of Motion for Preliminary Injunction. Filed by Attorney for Plaintiff.

11/22/2005	Declaration of Robert M. Dudnik in Support of Opposition to Defendant's Motion to Compel Arbitration. Filed by Attorney for Plaintiff.
11/22/2005	Opposition to Ferrer's Motion for Preliminary Injunction. Filed by Attorney for Defendant.
11/30/2005	Reply/Response – Declaration of Robert M. Dudnik in Support of Motion of Alex E. Ferrer for Preliminary Injunction. Filed by Attorney for Plaintiff.
11/30/2005	Reply/Response in Support of Motion to Compel Arbitration. Filed by Attorney for Defendant.
11/30/2005	Reply/Response – Memorandum in Support of Motion of Alex E. Ferrer for Preliminary Injunction. Filed by Attorney for Plaintiff.
12/14/2005	Supplemental Declaration of Robert M. Dudnik in Opposition to Defendant's Motion to Compel Arbitration. Filed by Attorney for Plaintiff.
1/31/2006	Notice of Appeal. Filed by Attorney for Defendant.
2/1/2006	Notice to Attorney re Notice of Appeal. Filed by Clerk.

California Court of Appeal and California Supreme Court Docket Entries

Court of Appeal Docket No. B188997
California Supreme Court Docket No. S149190

Alex E. Ferrer v. Arnold M. Preston
Appeal from Los Angeles Superior Court

2/10/2006	NOTICE OF APPEAL lodged/received. N/A 1.31.06 Arnold M. Preston 5.1 with no indication re: Reporters Transcript
2/17/2006	Civil Case Information Statement Filed
2/28/2006	Proceeding by 5.1 - no reporter's transcript.
3/22/2006	APPELLANT'S APPENDIX and OPENING BRIEF. Attorney: Schleimer, Joseph D.; Party: Preston, Arnold; 1 volume
4/11/2006	Stipulation of extension of time filed to: Attorney: Miller, Kirsten; Party: Ferrer, Alex
6/19/2006	RESPONDENT'S BRIEF. Attorney: Miller, Kirsten. Party: Ferrer, Alex
7/3/2006	Certificate of interested entities or persons filed by Appellant.
7/3/2006	APPELLANTS REPLY BRIEF.

7/3/2006	Case fully briefed.
9/28/2006	Calendar notice sent. Calendar date: 10/24/06 @ 9:00 a.m.
10/24/2006	Cause argued and submitted.
11/30/2006	Opinion filed.
1/3/2007	Service copy of Petition for Review received. Supreme Court Case No. S149190.
1/3/2007	Record transmitted to Supreme Court. 1x4"
2/14/2007	Petition for review denied in Supreme Court.
2/26/2007	Record returned from Supreme Court. 1x4"
3/6/2007	Remittitur issued.
3/6/2007	Case complete.
5/14/2007	Received letter from: US Supreme Court; stating writ of certiorari was filed and placed on docket 5/7/07 as No. 06-1463.

American Arbitration Association
Commercial Arbitration Rules
Demand for Arbitration

MEDIATION is a nonbinding process. The mediator assists the parties in working out a solution that is acceptable to them. If you would like the AAA to contact the other parties to determine whether they wish to mediate this matter, please check this box.
_X_ There is no additional administrative fee for this service.

To: Alex E. Ferrer
Address: 10310 S.W. 103 Terrace, Miami FL 33176
Phone No. 305-274-1248

Name of Representative (if known):
Ronald DiNicola, Esq.
Name of Firm (if applicable):
MS&K
Representative's Address:
11377 W. Olympic Blvd., L.A. CA 90064

The named claimant, a party to an arbitration agreement contained in a written contract dated 3-7-02 providing for arbitration under the Commercial Arbitration Rules of the American Arbitration Association, hereby demands arbitration thereunder.

Is this a dispute between a business and a consumer?
___Yes _x_No

THE NATURE OF THE DISPUTE

Failure to pay management fees. Repudiation of management agreement.

THE CLAIM OR RELIEF SOUGHT
(the Amount, if Any)

Management fees due and declaration fees due on future earnings. Arbitration in Los Angeles, California. Est. $75,000 to $150,000 + Attorney fees

DOES THIS DISPUTE ARISE OUT OF AN EMPLOYMENT RELATIONSHIP?
___ Yes _x_ No

IF THIS DISPUTE ARISES OUT OF AN EMPLOYMENT RELATIONSHIP, WHAT WAS/IS THE EMPLOYEE'S ANNUAL WAGE RANGE?
Note: this question is required by California law.
___ Less than $100,000 ___ $100,000 to $250,000
___ Over $250,000

TYPES OF BUSINESS

Claimant: Manager
Respondent: Private Judge

HEARING LOCALE REQUESTED

You are hereby notified that copies of our arbitration agreement and this demand are being filed with the American Arbitration Association at its Fresno office, with a request that it commence administration of the arbitration. Under the rules, you may file an

answering statement within fifteen days after notice from the AAA.

Signature (may be signed by a representative)

/s/ *Joseph D. Schleimer*

Title: Attorney
Date: June 4, 2005

Schleimer & Freundlich LLP
9100 Wilshire Blvd., Ste 615 East
Beverly Hills, CA 90212
Phone: 310-273-9807
Fax: 310-273-9809

NAME OF CLAIMANT: Arnold M. Preston

TO BEGIN PROCEEDINGS, PLEASE SEND TWO COPIES OF THIS DEMAND AND THE ARBITRATION AGREEMENT, WITH THE FILING FEE AS PROVIDED FOR IN THE RULES, TO THE AAA. SEND THE ORIGINAL DEMAND TO THE RESPONDENT.

[ATTACHMENT TO ARBITRATION DEMAND]

FAX COVER LETTER
Best Western Airport Plaza (Reno)

To: *Arnold Preston*
Company: *William Morris Agency*
From: *Alex Ferrer*
Number of Pages: *6*
Date: *3/7/02*
Fax: *310 248 5954*
....
Message: [Handwritten] *ARNIE, HERE IS THE EXECUTED AGREEMENT WITH THE CORRECTIONS WE DISCUSSED.*
/s/ Alex

[Page Break]

PERSONAL MANAGEMENT AGREEMENT

This document, entered into on March 6, 2002, by and between Judge Alex Ferrer (hereinafter referred to as "ARTIST"), located at 10310 S.W. 103rd Avenue, Miami, FL 33176 and Arnold M. Preston (hereinafter referred to as "MANAGER") located at 425 North Oakhurst Drive, Beverly Hills, CA 91210, will confirm our agreement regarding Managers services as Artist's Personal Manager:

1) TERM

Artist hereby engages Manager as their ~~sole and exclusive~~ [stricken by hand] "AF" [initials] Personal Manager, for a period of two (2) years,

commencing on the date set forth above (the "TERM"). Said Term shall renew automatically two (2) times (the "Term Extensions"), with each of the two Term Extensions renewing for a period of two (2) year periods, unless terminated by written notice by either party before thirty (30) days prior to the expiration of the Term or Term Extension(s), if applicable.

2. ENGAGEMENT & MANAGERS SERVICES

Manager agrees to perform services as Artists Personal Manager in the entertainment industry for the purpose of supervising, promoting, guiding, and directing Artists career in the capacity as performer, actor, comedian, voice over artists, entertainer, producer, director, promotional personality, writer and author. Manager will advise and counsel with regard to general practices in the entertainment industry, which include but are not limited to: the fields of media and television, radio, motion pictures, legitimate theatre, Internet, merchandising, endorsements, testimonials, commercials and appearances at hotels, restaurants, clubs, schools, colleges, nightclubs, one-night stands, and all other appearances, activities and interests in any way connected or pertinent to the entertainment industry and related fields. Manager will advise and counsel with respect to such matters of which Manager may have knowledge concerning compensation and privileges extended for similar artistic values, the selection of publicists, agents and other persons who will counsel, advise, seek & procure employment and engagements for Artist.

3) AUTHORIZATIONS

(i) Manager is authorized and empowered by Artist and on Artists behalf and in Managers discretion to do the following: approve and permit any and all publicity and advertising; approve and permit use of Artists name, photograph, likeness, voice, sound effects, literary and artistic materials for purposes of advertising and publicity in the promotion and advertising Artists career. In all cases, whenever possible, Manager will first consult with Artist with regards to the above, and Artist will do their best to supply Manager with "pre-approved" photos. Manager will, with Artists consultation and mutual agreement, engage as well as discharge and/or direct for Artist and in Artists name, agents, attorneys, business mangers, publicists as well as other persons, firms and corporations who may be retained to obtain contracts, engagements, or employment for Artist.

(ii) Manager is authorized by Artist to execute for Artist and in Artists name, any and all agreements, documents, and contracts for Artists services, talents, or artistic literary or

Artists Initials: *AF*

[Page Break]

musical matters, with Artists verbal approval. The authority herein granted Manager is irrevocable during the term hereof.

4) OFFERS OF EMPLOYMENT

Artist shall advise Manager of all offers of employment **[handwritten]** ***Related to Paragraph 6(i) Below*** submitted to Artist, verbally or in writing, and will refer any inquiries concerning Artists services **[handwritten]** ***Related to Paragraph 6(i) Below*** to Manager, in order that Manager may advise whether the same are compatible with Artists career. Manager will also advise Artist of all offers submitted to Manager on Artists' behalf.

5) NON-EXCLUSIVITY & EXCLUDED SERVICES

Artist recognizes that Manager may provide similar services for others and engage in other business activities, and Manager shall have the right to render their services to other persons, firms, or corporations, either in the capacity for which Manager is engaged hereunder or otherwise, including without limitation, services as a Producer, whether or not Artist is involved in the projects Manager produces. Managers' involvement as Producer, Writer, or Director in any project Artist is involved with shall not relieve Artist of their obligation to pay Manager a commission with respect to such project.

6) COMMISSIONS

i) In compensation for Managers services, Artist agrees to pay Manager a Commission on Gross Compensation (as defined below) received by Artist or on Artists' behalf, during or after the Term

[handwritten] ***for a contract entered into, stemming from the meeting attend by Artist on March 8, 2002 in Burbank, CA.*** **[initials]** ***AF***

as well as replacements, substitutes, extensions, modifications, options, and renewals of such contracts, negotiated or entered into during the Term for Artists services inthe entertainment industry. Such Commission shall be paid ~~**as follows**~~ **[stricken by hand] [handwritten]** ***at the rate of 12% of Gross Compensation.*** **[Initials]** ***AF***

[Stricken by hand]
~~**(a) Should Artists' Gross Compensation be equal to or less than US $100,000 in one Calendar Year, Artist shall pay Manager a ten (10%) percent commission (as an example, should Artists Gross Compensation for a Calendar Year equal US $85,000, than Managers total commission for that Calendar Year shall equal US $8500).**~~

~~**(b) Should Artists Gross Compensation be greater than US $100,000 yet equal to or less than US $150,00 in one Calendar Year, Artist shall pay Manager a twelve and one-half (12.5%) percent commission on ALL of such Gross Compensation (as an example, should Artists Gross Compensation for a Calendar Year equal US $125,000, then Managers total commission for that Calendar Year shall equal US $15,625).**~~

~~**(c) Should Artists Gross Compensation be greater than US $150,000 in one Calendar Year,**~~

~~**Artist shall pay Manager a fifteen (15%) percent commission on ALL of such Gross Compensation (as an example, should Artists Gross Compensation for a Calendar Year equal $175,000, than Managers total commission for that Calendar Year shall equal US $26,500).**~~

(ii) If Artists materials or services are furnished by a corporation, and if monies received by such corporation would have been commissionable by Manager had Artist been engaged to furnish such materials and services directly, then Manager shall be obligated to render the same services to such corporation as would have been obligated to enter unto Artist, and Artist

Artists Initials: ***AF***

[Page Break]

agrees that commission received from such corporation shall be in lieu of commission received directly from Artist, at the rate specified herein.

(iii) Manager shall be entitled to compensation with such compensation based on the Commission structure outlined in Paragraph 6(i) ~~**a-c**~~ **[stricken by hand],** with respect to any contract covered by **[Initials]** ***AF*** this agreement, for so long as Artist continues to receive compensation thereto, which Artist may receive as a result of their activities in and throughout the entertainment industry. Managers Commission and applicable percentage shall apply to all Gross Compensation, including but not limited to, stock, right to buy stock, individual

proprietorship, stockholder, partnership, joint venture, or other form of interest, and Manager shall be entitlted to Managers applicable percentage share thereof.

iv) The term Gross Compensation, as used herein, shall mean one hundred percent (100%) of ANY AND ALL monies, properties, and considerations of any kind or character, including without limitation, salaries, earnings, fees, royalties, bonuses, and other compensation received by Artist for all services rendered, which are covered under this Agreement. Other compensation shall be considered to include, but not be limited to:

(a) Artists receipt of stock, interest in, or the right to buy stock or interest in any corporation, as all or part of their compensation for activities thereunder. Should Artist be required to make any payment for such stock or interest, Manager will pay Managers percentage share of such payment, unless Manager does not want Managers percentage share thereof.

(b) Fees received by Artist should Artist become the packager or owner of all or part of an entertainment property, whether as an individual proprietor, stockholder, partner, joint venture or otherwise.

v) Artist understands that Manager is not required to produce any of Artists projects, but in the event Manager does so, Artist may negotiate a reduced or waived commission, on a per-case basis.

vi) Artist agrees to issue instructions to Artists

business manager and/or controller who supervises and maintains Artists books and records, as they pertain to the Gross Compensation and other considerations hereunder, that Manager and business manager and/or controller will work cooperatively in assuring that Manager has been paid, and Manager will receive monthly statements reflecting these payments.

7) CONTINUING COMMISSIONS

If this agreement is with a partnership, the death of a partner shall not affect this agreement in any way. If this agreement is with a corporation or an individual, then, as to Artists Gross Compensation or other considerations earned after Managers death, from engagements, contracts, and agreements commenced and entered into or substantially negotiated prior to Managers death, Managers estate or corporation shall still be entitled to said commissions contained herein, and specified for the duration of all such engagements, contracts and agreements, and any extensions, renewals, and substitutions thereof.

8) EXTENSIONS

Artists Initials: ***AF***

[Page Break]

A contract shall also be deemed covered by this Agreement if it is made within forty five (45) days after the expiration of the term hereof and Artist was submitted or considered for said contract during the

Term of this Agreement.

9) CREDIT

Artist will at all times make their best effort to credit Managers name and/or Managers company's name in any and all newspaper or magazine articles, press and trade announcements, and any other publicity, including live or recorded appearances, interviews, and award ceremonies, as Artists Personal Manager. If Artist has made their best efforts to include such information, and Managers name and/or Managers company name is subsequently omitted from any of the above unintentionally on my part, Manager agrees to hold Artist harmless.

10) RELATIONSHIP OF PARTIES

Manager shall render Managers services hereunder as an independent contractor. Nothing contained in this agreement shall be construed as forming a partnership or joint venture between Manager and Artist. Manager may appoint or engage any and all other persons, firms, and corporations throughout the world, in Manager's discretion, to perform any and all services which manager has agreed to perform hereunder, all under the direction and supervision of Manager, and Manager's expense.

11) ASSIGNMENT

Manager shall have the right to assign this Agreement, or any part of Managers rights hereunder, to any person, corporation, partnership,

etc., that Cat Josell and/or Josell Management, is a majority stockholder, general partner or employee of, during the Term(s) of this Agreement. However, Manager shall continue to be Artists primary Manager, unless Artist and Manager otherwise agree.

12) NOTICE

Manager shall not be deemed in breach or default under this agreement unless Artist gives Manager written notice of such breach or default and Manager fails to cure such breach or default within thirty (30) days after receipt of notice via certified mail, which shall describe the exact breach. Artist shall not be deemed in breach or default under this agreement unless Manager gives Artist written notice of such breach or default and Artist fails to cure such breach or default within thirty (30) days after receipt of notice via certified mail, which shall describe the exact breach. This agreement shall be governed by the laws of the state of California, applicable to agreements wholly entered into and performed herein.

Artists Initials: ***AF***

[Page Break]

13) ARBITRATION

In the event of any action, suit, or proceeding arising from or based upon this Agreement brought by either party hereto against each other, the prevailing party shall be entitled to recover from the other attorneys

fees in connection therewith in addition to the costs of such action, suit, or proceeding. In the event of any dispute under or relating to the terms of this agreement, or the breach, validity, or legality thereof, it is agreed that the same shall be submitted to arbitration to the American Arbitration Association in the city of Los Angeles, California, and in accordance with the rules promulgated by the said association, and judgment upon the award rendered by the arbitrator(s), may be entered into any court having jurisdiction thereof. Nothing in this agreement shall be construed as to require any act contrary to any law or regulation of any guild or union. If there is any conflict between this agreement and any present or future law, the latter shall prevail, but in such an event, the provisions of such agreement so affected shall be curtailed only to the extent necessary to bring it within the requirements of said law, rule, or regulation.

14) ENTIRE AGREEMENT

This document constitutes the entire agreement between us, and supercedes any other oral or written agreements between us, which we may have entered into in regards to the contents herein. Should any provision of this agreement be invalid, illegal or unenforceable, the remainder of this agreement shall remain in full force and effect. This agreement may not be cancelled, altered, or amended, except in writing signed by both parties.

15) PARAGRAPH NUMBERS AND HEADINGS

Paragraph Numbers and Headings are for the convenience of the Parties only, and shall have no operative effect.

Artists Initials: *AF*

[Page Break]

SIGNATURE PAGE

A faxed copy of this Agreement is as binding as an original.

If the foregoing meets with your approval, please indicate your acceptance and agreement by signing in the space provided below and initializing the bottom of each page.

Artist: */s/ Alex Ferrer*

Address: 10310 SW 103 Terrace

MIAMI, FL 33176

Phone: (305) 274-1248 (H) (305) 975-0579 (cell)

Agreed to and Countersigned by:

/s/ Arnold Preston
425 N. Oakhurst Dr
Beverly Hills, CA 91210
310-344-0725

Artists Initials: *AF*

BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

ALEX E. FERRER, an individual,	)	
	)	
	)	PETITION TO DETERMI
Petitioner,	)	CONTROVERSY
	)	
v.	)	(Labor Code Section 1700.4
	)	
ARNOLD M. PRESTON, an individual,	)	
	)	
Respondent	)	
	)	

Petitioner Alex E. Ferrer ("Ferrer") alleges as follows:

1. This Petition is filed pursuant to the authority of Section 1700.44 of the Labor Code of the State of California.

2. Ferrer is informed and believes and, on that basis, alleges that at all times mentioned herein Respondent Arnold M. Preston ("Preston"), was and is now residing within the County of Los Angeles, in the State of California. Additionally, Ferrer is informed and believes and, on that basis, alleges that Preston was and is doing business in the County of Los Angeles, in the State of California.

3. Ferrer is informed and believes and, on that basis, alleges that at all times material herein

respondent Preston acted, and held himself out to others as, a talent agent although he was not licensed as a talent agent as required under California Labor Code Section 1700 *et. seq.* (the "Talent Agencies Act"). See, CAL. LAB. CODE §1700.5

4. Ferrer at all times material herein was and is a resident of the State of Florida. He is a respected former Florida state court judge. In or about 2001 and 2002, Ferrer was exploring opportunities in the television and motion picture industry to act in the role of a judge on a court television show. Ferrer had no prior experience in the entertainment industry, was not represented by counsel, and was unaware of the licensing requirements of the California Labor Commissioner regarding talent agents.

5. In early 2002, Ferrer contacted Preston at the suggestion of a friend and sent Preston his tape and biography. At the time, Ferrer believed Preston was a talent agent working at the William Morris Agency ("WMA") and that Preston could procure work for him. Preston was, in fact, an assistant at the WMA and was not a licensed talent agent.

6. Preston, thereafter, engaged in "procuring, offering, promising, or attempting to procure employment" for Ferrer. He held himself out to Ferrer and others as a licensed talent agent when, in fact, he was not. For example, in March, 2002, Preston contacted Ferrer regarding a meeting at Buena Vista Television with television executives and producers to discuss a role for Ferrer as a judge on a

court television show ("Buena Vista Meeting"). On or about March 7, 2002, shortly before the scheduled Buena Vista Meeting, Preston presented Ferrer with an agreement ("Agreement"), attached hereto and marked as Exhibit "A". Preston told Ferrer that Ferrer must sign the Agreement, or Preston would not finalize arrangements for this and/or other meetings.

7. Under the terms of the Agreement, Preston was to receive in exchange for "management services" rendered by Preston, twelve percent (12%) of gross compensation paid to Ferrer. Thereafter, pursuant to the Agreement, Preston engaged in procuring, offering to procure, promising to procure, and attempting to procure employment for Ferrer as an actor in the entertainment industry.

8. In late 2004, Ferrer was hired in the role of a judge for a FOX Television series ("FOX Series"), set to air on FOX in the fall of 2005. Preston did not participate in the negotiations in connection with the FOX series.

9. On June 10, 2005, Preston filed a demand for Arbitration before the American Arbitration Association, pursuant to an arbitration provision in the Agreement, demanding "management fees" of $75,000 – $150,000. Preston alleges he is entitled to a commission on Ferrer's compensation on the FOX series pursuant to the Agreement because, according to Preston, it "stems" from the Buena Vista Meeting.

10. In arranging the Buena Vista Meeting, and otherwise procuring, promising to procure, and attempting to procure employment for Ferrer, Preston acted as an unlicensed talent agent in violation of the Talent Agencies Act and, therefore, his claim for compensation under the Agreement fails as a matter of law. *See* CAL. LAB. CODE §§ 1700.4, 1700.5, *Styne v. Stevens*, 26 Cal.4th 42, 50-51 (2001).

11. As a result of the foregoing, an actual and justiciable controversy has arisen between Ferrer and Preston. Ferrer seeks a determination:

(a) That Preston is not entitled to retain or receive any commissions from Ferrer based on the Agreement which is void under the Talent Agencies Act. *See* CAL. LAB. CODE §1700, *et. seq.*; and

(b) Staying the Arbitration Proceedings in Case No. 720140 000591 05 RWH pending before the American Arbitration Association; and

(c) Awarding Ferrer reasonable attorneys fees and costs; and

(d) For such other relief as the Commissioner deems just and proper.

Dated: July 5, 2005

MITCHELL SILBERBERG & KNUPP LLP
RONALD A. DINICOLA

By: */s/ Ronald A. DiNicola*
Ronald A. DiNicola
Attorney for Petitioner
Alex E. Ferrer

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between

Arnold M. Preston

–vs.–

Alex E. Ferrer

CASE NUMBER 72 140 00591 05 RWH

REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER #1

On September 29, 2005, the Motion by Respondent Alex E. Ferrer ("Respondent") to stay Arbitration Proceedings came on for hearing before the Arbitrator. Specially appearing to argue the Motion was Ronald A. DiNicola of Mitchell Silberberg & Knupp, LLP on behalf of Respondent and appearing in opposition to the Motion was Joseph D. Schleimer of Schleimer & Freundlich, LLP for Petitioner Arnold M. Preston ("Petitioner").

With due consideration to all points, authorities and argument, the Motion is denied. Applicable authority cited by both parties acknowledges that "the Talent Agencies Act specifically allows parties to provide in their contract that disputes thereunder shall be resolved by private arbitration, rather than by the Commissioner. (1700.45)." Styne v. Stevenson, 26 Cal.4th 42, 58, fn.

9 (2001). Furthermore, the Motion was predicated upon a favorable resolution of disputed questions of fact which cannot be determined at this time without evidence or hearing.

The AAA Administrator shall be requested to submit calendars for the prompt scheduling of the prehearing conference in this matter.

Dated: October 12, 2005

/s/ Philip W. Boesch, Jr.
PHILLIP W. BOESCH, JR.
Arbitrator

SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ALEX E. FERRER,	)	Case No. BC 342454
	)	
Plaintiff	)	COMPLAINT FOR
v.	)	DECLARATORY
	)	RELIEF AND
ARNOLD M. PRESTON,	)	PRELIMINARY
	)	AND PERMANENT
Defendant	)	INJUNCTIONS
	)	

For his complaint herein, Plaintiff alleges as follows:

1. Defendant is an individual residing in the County of Los Angeles, State of California.

2. On or about March 6, 2002, Plaintiff and Defendant entered into a written contract in the County of Los Angeles, State of California entitled "Personal Management Agreement" (the "Contract").

3. Pursuant to the Contract, Defendant claims to have procured employment for Plaintiff in the entertainment industry and further claims that, pursuant to the Contract, he is owed certain commissions based on revenues received and to be received by Plaintiff resulting from such employment.

4. On or about June 4, 2005, Defendant instituted an arbitration proceeding with the

American Arbitration Association in pursuit of his claim for said commissions, taking the position that an arbitration provision in the Contract vests authority in an arbitrator to decide all disputes and differences between Plaintiff and Defendant arising from or related to the Contract, including the disputed issue of whether the Contract is void.

5. Plaintiff disputes Defendant's contention that said arbitration provision authorizes an arbitrator to decide all such disputes and differences. In particular, Plaintiff contends that (a) the Contract is void by reason of Defendant's attempt to procure employment for Plaintiff in violation of the California Labor Code §§ 1700.00 – 1700.47 (commonly referred to as "the Talent Agencies Act"), (b) the Contract's arbitration clause does not vest authority in an arbitrator to determine whether the contract is void, and (c) the Labor Commissioner of the State of California has exclusive authority not only to decide that issue, but also to decide the issue of his/her jurisdiction to decide that issue.

6. Based upon his above-described contention, Plaintiff has filed a Petition to Determine Controversy with the Labor Commissioner, which is still pending, and a Motion to Stay Arbitration Proceedings Pending Disposition of Petition to Determine Controversy Before Labor Commissioner, which motion was denied on or about October 12, 2005.

7. By reason of the denial of said motion to stay arbitration proceedings, the arbitrator in the

arbitration instituted by Defendant intends to proceed with the arbitration and, unless enjoined and restrained, preliminarily and permanently, Defendant will proceed with and participate in such arbitration.

First Cause of Action

8. Plaintiff incorporates by reference paragraph Nos. 1-7, inclusive, set forth above as though set forth in full.

9. An actual and justiciable controversy has arisen and exists between Plaintiff and Defendant in that Defendant contends that the issue of whether the Contract is void is within the jurisdiction of the arbitrator, and Plaintiff contends that that issue is within the exclusive jurisdiction of the California Labor Commissioner, notwithstanding the Contract's arbitration provision and California Labor Code §1700.45.

Second Cause of Action

10. Plaintiff incorporates by reference paragraph Nos.1–9, inclusive, set forth above as though set forth in full.

11. Unless Defendant is preliminarily and permanently enjoined from proceeding with and/or participating in the pending arbitration unless and until, if ever, the Labor Commissioner rules that he/she does not have jurisdiction over the parties' disputes, Plaintiff will likely suffer great and

irreparable injury, and Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. That the court determine and declare that the existing controversy between Plaintiff and Defendant arising from the Contract, including in particular the issue of the validity of the Contract, is not subject to arbitration;

2. For a preliminary injunction and a permanent injunction enjoining and restraining Defendant from proceeding with the arbitration currently pending before the American Arbitration Association as: Preston v. Ferrer, Case No. 720140 00591 05 RWH unless and until, if ever, the Labor Commissioner determines that he/she has no jurisdiction over the parties' dispute.

3. For costs of suit incurred herein;

4. For attorneys' fees, to the extent permitted by law; and

5. For such other and further relief as the court may deem just and proper.

Dated: November 2, 2005

MITCHELL SILBERBERG
& KNUPP LLP
RONALD A. DiNICOLA
ROBERT M. DUDNIK
KIRSTEN MILLER

BY: */s/ Robert M. Dudnik*
Robert M. Dudnik,
Attorneys for Plaintiff,
Alex E. Ferrer

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between

Arnold M. Preston

–vs–

Alex E. Ferrer

CASE NUMBER 72 140 00591 05 RWH

REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER #2

On November 3, 2005, a Preliminary Hearing Conference came on for hearing before the Arbitrator. Specially appearing, subject to continuing objection to jurisdiction, was Ronald A. DiNicola of Mitchell, Silberberg & Knupp, LLP on behalf of Respondent Alex E. Ferrer ("Respondent"). Appearing for Petitioner Arnold M. Preston ("Petitioner") was Joseph D. Schleimer of Schleimer & Freundlich, LLP.

By agreement of the parties and order of the Arbitrator, the following is now in effect:

1. Hearings in this matter are set for January 26 and 27, 2006 at the offices of the American Arbitration Association in Los Angeles, California.

2. On or before December 21, 2005, either

party may serve upon the other a Request for Production of Documents.

3. On or before January 18, 2006, the party upon whom such a Request is served shall serve a Response, and produce all responsive documents and/or specify any objections with particularity.

4. On or before January 18, 2006, each party shall serve a witness list, identifying all witnesses that either side anticipates calling at the hearing of this matter.

5. The parties confirm that they have stipulated to the Accelerated Exchange Program of the American Arbitration Association.

Dated: November 3, 2005

/s/ Philip W. Boesch, Jr.
PHILLIP W. BOESCH, JR.
Arbitrator

BEFORE THE LABOR COMMISSIONER
OF THE STATE OF CALIFORNIA

ALEX E. FERRER,	**CASE NO. TAC 28-05**
Petitioner,	
vs.	
ARNOLD M. PRESTON	
Respondent	

ORDER ON PETITIONER'S MOTION TO STAY ARBITRATION PROCEEDINGS PENDING DISPOSITION OF PETITION TO DETERMINE CONTROVERSY BEFORE CALIFORNIA LABOR COMMISSIONER

Petitioner's motion to stay arbitration proceedings pending disposition of petition to determine controversy before California Labor Commissioner is denied on the grounds that the Labor Commissioner does not have the authority to stay arbitration proceedings. Such a motion must be made directly to the arbitrator or to the superior court.

ORDER ON RESPONDENT'S COUNTER-MOTION TO DISMISS CASE FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

Respondent's counter-motion to dismiss for

lack of subject matter jurisdiction and failure to state a claim is denied. "When the Talent Agencies Act is invoked in the course of a contract dispute, the Commissioner has exclusive jurisdiction to determine his jurisdiction over the matter, including whether the contract involved the services of a talent agency." *Styne v. Stevens*, 26 Cal.4th 42, 54. Petitioner raises the Talent Agency Act in defense to Respondent's demand for Arbitration demanding "management fees" pursuant to a contract entered into between the parties. Accordingly, this case presents a colorable basis for exercise of the Labor Commissioner's jurisdiction and therefore, the matter must be submitted to the Labor Commissioner for determination. *Id.* at 60.

NOTICE OF HEARING

PLEASE TAKE NOTICE that the above-captioned matter has been scheduled for a hearing before the undersigned attorney for the Labor Commissioner on Monday, March 6, 2006, at 10:00 a.m., at 320 W. 4th Street, Suite 430, Los Angeles, Ca. 90013.

At this hearing, the parties will be permitted to testify, present evidence, and question witnesses. The Labor Commissioner's determination of this controversy will be based upon the evidence and testimony presented at this hearing.

Dated: 11/8/05

/s/ Edna Garcia Earley
EDNA GARCIA EARLEY,
Attorney for the Labor Commissioner

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between

Arnold M. Preston

–vs–

Alex E. Ferrer

CASE NUMBER 72 140 00591 05 RWH

DECISION ON MOTION AND ORDER NO. 2

On November 9, 2005, Respondent Alex E. Ferrer ("Respondent"), specially appearing, made a Motion for Reconsideration ("the Motion") of the Arbitrator's Order denying Respondent's Motion to Stay Arbitration Proceedings pending disposition of the matter before the Labor Commissioner. Petitioner Arnold M. Preston ("Petitioner") filed an Opposition to the Motion ("the Opposition").

The Motion is based on all previous filings in this Arbitration and upon an Order on Petitioner's Motion to Stay Arbitration Proceedings Pending Disposition of Petition to Determine Controversy Before the California Labor Commissioner; Order on Respondent's Counter-Motion to Dismiss Case for Lack Subject Matter Jurisdiction and Failure to State a Claim, in Case No. TAC 28-05 before the Labor Commissioner of the State of California, which Order was signed by Edna Garcia Earley, Attorney for the

Labor Commissioner, on November 8, 2005 ("the Labor Commissioner Order"). The Labor Commissioner Order in pertinent part cites the case of Styne v. Stevens, 26 Cal.4th 42, 54 (2001), and then concludes that because the dispute between Petitioner and Respondent presents a "colorable basis for exercise of the Labor Commissioner's jurisdiction," the dispute must be submitted to the Labor Commissioner for determination.

After consideration of the Motion and Opposition, and for good cause shown, it is hereby ordered:

1. The Motion is granted and Arbitration is stayed pending disposition of the matter before the Labor Commissioner, or pending further order of the Arbitrator.

2. In Styne v. Stevens, which both parties and apparently counsel for the Labor Commissioner recognize as applicable authority, the Supreme Court observed in dicta:

> Amici curiae additionally argue that arbitration will be undermined by a requirement that artist's Talent Agencies Act defenses (particularly defensive claims that an alleged contract is void under the Act) must be referred to the Commissioner. But this assertion does not appear directed at the issue of defenses in particular. The contention raised by amici curiae, if valid at all, applies equally whether the artist seeks affirmative relief

> under the Act, or raises the Act only for defensive purposes. Moreover, the Talent Agencies Act specifically allows parties to provide in their contract that disputes thereunder shall be resolved by private arbitration, rather than by the Commissioner. (§1700.45). Nothing in our reasoning restricts this right.

26 Cal.4th at 54

In Styne v. Stevens, when the California Supreme Court recognized that two parties may provide for private arbitration of their disputes, the Supreme Court confirmed that parties could contract to arbitrate their disputes even when the disputes would otherwise fall within the jurisdiction of the Labor Commissioner.

3. The two parties to this Arbitration are the same parties to the Labor Commissioner matter; and these two parties, Arnold M. Preston and Alex E. Ferrer, executed a contract with an arbitration clause which states as follows:

> **13) ARBITRATION**
>
> In the event of any action, suit, or proceeding arising from or based upon this Agreement brought by either party hereto against each other, the prevailing party shall be entitled to recover from the other attorney's fees in connection therewith in addition to the costs of such action, suit, or proceeding. In the event of

any dispute under or relating to the terms of this agreement, or the breach, validity, or legality thereof, it is agreed that the same shall be submitted to arbitration to the American Arbitration Association in the city of Los Angeles, California, and in accordance with the rules promulgated by the said association, and judgment upon the award rendered by the arbitrator(s), may be entered into any court having jurisdiction thereof. Nothing in this agreement shall be construed as to require any act contrary to any law or regulation of any guild or union. If there is any conflict between this agreement and any present or future law, the latter shall prevail, but in such an event, the provisions of such agreement so affected shall be curtailed only to the extent necessary to bring it within the requirements of said law, rule, or regulation." (Emphasis added)

4. Rule 43 of the American Arbitration Association ("AAA") states that: "(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties including, but not limited to, specific performance of a contract." In denying Respondent's previous motion to stay arbitration proceedings, the Arbitrator entered Order No. 2 in part because evidence, factual findings and further briefing could inform the Arbitrator as to the meaning and application of the Arbitration Clause, the meaning and applicability of the Talent Agencies Act to the facts of the case, and the remedy or relief that would be just and equitable and within the scope

of the agreement.

5. Even though evidence and factual findings still could inform the Arbitrator as to such matters, the Arbitrator has nonetheless granted the Motion for reconsideration (i) in the interest of the AAA Rules which also promote the cost effective resolution of disputes, because it is not cost effective to have parallel proceedings simultaneously pending, and (ii) because the results of the Labor Commissioner hearing also could inform the Arbitrator as to the remedy or relief that would be just and equitable under the circumstances of this case.

Dated: December 6, 2005

/s/ Philip W. Boesch
PHILLIP W. BOESCH, JR.
Arbitrator

BEFORE THE LABOR COMMISSIONER

FOR THE STATE OF CALIFORNIA

ALEX E. FERRER,	) Case No. TAC 28-05
	)
	) **STIPULATION TO**
Petitioner,	) **REQUEST STAY**
	) **OF LABOR**
vs.	) **COMMISSIONER**
	) **PROCEEDINGS UNTIL**
	) **RESOLUTION OF**
ARNOLD M. PRESTON,	) **APPEAL TO THE**
	) **CALIFORNIA COURT**
	) **OF APPEAL ON**
Respondent.	) **ARBITRABILITY**
	) **ISSUE**
	)
_____	)**–and–**
	[PROPOSED] ORDER STAYING PROCEEDING

TO THE LABOR COMMISSIONER OF CALIFORNIA:

The parties hereto stipulate as follows:

WHEREAS, Respondent Arnold M. Preston has filed an appeal to the California Court of Appeal, pursuant to C.C.P. §§904.1 and 1294(a), from the Order of the Los Angeles Superior Court denying

Respondent's motion to compel arbitration and the related injunction staying arbitration. A copy of the Notice of Appeal is attached hereto; and

WHEREAS, there is a hearing on the merits in this action set for March 6, 2006; and

WHEREAS, the parties agree that the issue of arbitrability of the Talent Agencies Act issues presented by the Petition herein should be finally decided by the California Courts before the administrative hearing in this matter, in the interest of judicial economy;

THEREFORE, the parties hereto stipulate to respectfully request a stay of the proceedings in this administrative action until such time as the appeal is resolved.

Respectfully submitted,
Dated: February 8, 2006

Mitchell, Silberberg & Knupp

BY: */s/ Ronald A. DiNicola*
Ronald A. DiNicola, Attorneys
for Petitioner Alex E. Ferrer

Dated: February 14,2006

Schleimer & Freundlich LLP

By: */s/ Joseph D. Schleimer*
Joseph D. Schleimer, Attorneys for
Respondent Arnold M. Preston

[Proposed] ORDER

It is so ORDERED. This proceeding is stayed until the pending appeal is resolved and the hearing set for March 6, 2006 is OFF CALENDAR.

Dated: *February 15, 2006*

LABOR COMMISSIONER OF CALIFORNIA

BY: */s/ Edna Garcia Earley*
Edna Garcia Earley, Hearing Officer

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No. 06-1463

IN THE
Supreme Court of the United States

ARNOLD M. PRESTON,

Petitioner,

v.

ALEX E. FERRER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE PETITIONER

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Counsel for Petitioner

November 1, 2007

QUESTION PRESENTED

Whether the Federal Arbitration Act and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) preempt the holding in this case, voiding an interstate arbitration agreement under the California Talent Agencies Act?

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OPINIONS BELOW

The *Order Denying Review* by the California Supreme Court was entered on February 14, 2007. Petition for Writ of Certiorari Appendix ("Pet. App.") 1a.

The *majority opinion* of the California Court of Appeal dated November 30, 2006, was published as *Ferrer v. Preston* (2006) 145 Cal.App.4th 440 and is set forth at Pet. App. 2a–12a.

The *dissent* by the Hon. Miriam A. Vogel, Justice, California Court of Appeal, is set forth at Pet. App. 12a–17a.

JURISDICTION

The decision of the California Courts was final upon the denial of review by the California Supreme Court, entered on February 14, 2007. Pet. App. 1a. The Petition for a Writ of Certiorari was filed on May 4, 2007 and was granted on September 25, 2007.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a), as it involves an issue of Federal preemption under the Supremacy Clause of the U.S. Constitution (Article VI, clause 2) and the Federal Arbitration Act, 9 U.S.C. §2. See *Southland Corporation v. Keating*, 465 U.S. 1 (1984).

STATUTES INVOLVED

Federal Arbitration Act

9 U.S.C. §2, states, in pertinent part:

> A written provision in any. . .contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract. . .or the refusal to perform the whole or any part thereof. . . .shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

California Labor Code

California Labor Code §1700.44(a), states, in pertinent part:

> In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard *de novo*.

STATEMENT OF THE CASE

This case concerns the issue whether the Federal Arbitration Act preempts California Labor Code §1700.44 (a), as construed by the California Court of Appeal.

The Court of Appeal held that §1700.44(a) abrogated Petitioner's right to arbitrate by granting exclusive jurisdiction to the California Labor Commissioner to determine the validity of an artist's personal management contract. Petitioner contends that the Court of Appeal misinterpreted and failed to adhere to *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), because Respondent disputed the validity of the entire contract, but made no challenge to the arbitration clause itself.

Respondent Alex E. Ferrer is a former Florida Circuit Court Judge who now makes his living as the star of *Judge Alex*, a television program syndicated nationwide by Twentieth Century Fox, in which Respondent arbitrates petty civil disputes as a form of entertainment. Pet. App 3a.

Petitioner Arnold M. Preston ("Preston") is an attorney, who renders services as a personal manager, advising and counseling artistic personnel in the motion picture-television industry. Pet. App. 3a, 12a; J.A. 9.

In March, 2002, Mr. Preston and Judge Ferrer entered into a written contract ("Management Agreement") which provides for payment of a fee on

Judge Ferrer's earnings from *Judge Alex*. J.A. 8–19.

The Management Agreement included a standard American Arbitration Association provision calling for arbitration of disputes. J.A. 17, ¶13. The arbitration clause specifically provided that disputes about the "validity" and "legality" of the contract would be decided by arbitration.

Judge Ferrer resides in Florida and tapes the *Judge Alex* television program in Texas. Pet. App. 11a. Mr. Preston had his office in California. *Id.* As it happened, Judge Ferrer was in Nevada when he signed the Management Agreement. *Id.* As such, the *interstate* nature of the contract has never been in dispute.

When *Judge Alex* went on the air, Judge Ferrer refused to pay the management fee, so on June 4, 2005, Mr. Preston commenced a proceeding with the American Arbitration Association in Los Angeles, California. J.A. 5–19.

Judge Ferrer responded on July 5, 2005, by filing an action with the California Labor Commissioner, challenging the legality of the *entire management contract* under the California Talent Agencies Act. J.A. 20–23. Among other things, his Petition asked for a declaration the Management Agreement is void, and based thereon, for an order staying the arbitration. J.A. 23.

The Labor Commissioner's hearing officer determined the Ferrer petition asserted a "colorable

basis for exercise of the Labor Commissioner's jurisdiction...." J.A. 33. However, she also determined that she lacked the authority to stay the arbitration. J.A. 32.

The arbitrator set a hearing on the merits for January 26, 2006. J.A. 30. To head the merits hearing off, on November 2, 2005, Judge Ferrer filed suit in the Los Angeles Superior Court, seeking an injunction against the arbitration. J.A. 26–29. On November 8, 2005, Mr. Preston responded by filing a Motion to Compel Arbitration in the Superior Court. Pet. App. 4a.

On December 7, 2005, the Superior Court denied Mr. Preston's Motion to Compel Arbitration, issued the injunction against the arbitration, and ordered that the legality of the entire contract under the Talent Agencies Act would be decided by the Labor Commissioner, not the Arbitrator. Pet. App. 18a–27a.

During all of these proceedings, Judge Ferrer's challenge to arbitration was based on his claim *the entire Management Agreement was invalid*, and at no time did he make any challenge to the validity of the arbitration clause. Pet. App. 14a. Indeed, the undisputed evidence was that Judge Ferrer initialed every page of the Management Agreement, including the page bearing the arbitration clause. Pet. App. 13a; J.A. 8–19.

The California Court of Appeal affirmed in a 2-1 decision, based on California Labor Code §1700.44(a), which the Court held gives the Labor Commissioner

exclusive jurisdiction to hear disputes under the Talent Agencies Act. The Court of Appeal stated:

> The question before us is who has original jurisdiction to make the determination as to the validity of the parties' contract. Defendant contends that the question of the contract's validity should be determined by the arbitrator. . . .We disagree.
>
> The parties' contract included a standard AAA arbitration clause, including a stipulation that the parties are to arbitrate any attack on the "validity or legality" of the contract. However, as interpreted by the courts, [Labor Code] section 1700.44, subdivision (a), vests exclusive original jurisdiction in the Commissioner to resolve issues arising under the Act. . . .

Pet. App. 6a.

The dissenting opinion by Justice Miriam A. Vogel argued that the Federal Arbitration Act (9 U.S.C. §2) and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) ("*Buckeye*") preempted the majority decision, stating:

> Because it is undisputed (correctly) that the contract before us is governed by the FAA . . . it follows necessarily that the arbitrator and not the court must

> determine the gateway issues. My colleagues' contrary conclusion – based on the fact that the *Buckeye* court did not consider whether the issue should go first to a state administrative agency – ignores *Buckeye's* holding that its rules trump conflicting state procedures.

Pet. App. 16a.

The majority of the Court of Appeal did not dispute the applicability of the Federal Arbitration Act, but distinguished *Buckeye* on the grounds that the Talent Agencies Act vests initial jurisdiction in an *administrative agency*, whereas *Buckeye* involved an attempt to avoid arbitration by filing a lawsuit in a court:

> [Preston] also argues that the Federal Arbitration Act. . . preempts California law requiring the Commissioner to first adjudicate the legality of the contract....
>
> *Buckeye* is inapposite . . . [because it] did not involve an administrative agency with exclusive jurisdiction over a disputed issue. *Buckeye* did not consider whether the FAA preempts application of the exhaustion doctrine. . . .

Pet. App. 10a.

Decisions of the California Labor Commissioner are subject to a trial *de novo* in the Superior Court

pursuant to California Labor Code §§ 98.2 and 1700.44(a). See *Sinnamon v. McKay* (1983) 142 Cal.App.3d 847. As such, the Labor Commissioner hearing is just an *initial step* in a protracted adjudication process which usually winds up, like this case did, in the California court system.

Thus, absent a reversal by this Court, pursuant to the California Court of Appeal decision this case would be remanded to the Labor Commissioner, where an administrative hearing would be conducted on the legality of the entire contract, possibly followed by a trial *de novo* in the Superior Court on the same issue, possibly followed by yet another appeal.

In other words, Mr. Preston's arbitration could ultimately be delayed until *four to five years* after the filing of his original arbitration demand, and only take place after he has incurred oppressive legal fees litigating before the Labor Commissioner, *de novo* in the Superior Court, and a second time before the California appellate courts.

SUMMARY OF THE ARGUMENT

Since this case involves a challenge to the legality of the *entire contract*, with no challenge to the arbitration clause itself, state law is preempted and the arbitrator decides the issue of legality. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

Another provision of the California Labor Code, which purported to abrogate the right to arbitrate wage claims and channel them to a *judicial* tribunal,

was held preempted by the Federal Arbitration Act ("FAA"). *Perry v. Thomas*, 482 U.S. 483 (1987).

The Court of Appeal's distinction, that the California Labor Code grants initial jurisdiction to an *administrative* tribunal instead of a court, does not avoid preemption under the FAA. *Gilmer v. Interstate/ Johnson Lane Corporation*, 500 U.S. 20, 28-29 (1991) ("[T]he mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration."); *Saturn Distribution Corp. v. Paramount Saturn, Ltd.*, 326 F.3d 684, 687 (5th Cir. 2003)(State law which abrogates the right to arbitration in favor of administrative tribunal is preempted by the FAA).

ARGUMENT

Congress enacted the FAA to counter judicial hostility toward arbitration agreements, a bias inherited from the English courts, which were jealous of any usurpation of their jurisdiction. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001).

Although some early decisions of this Court demonstrated a reluctance to abandon the traditional judicial hostility toward arbitration, that attitude was subject to steady erosion, and the "outmoded presumption of disfavoring arbitration proceedings" was completely cast aside by the 1980s. *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-481 (1989); *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 2 13

(1985).

In enacting the Federal Arbitration Act, Congress declared a national policy favoring arbitration "and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corporation v. Keating*, 465 U.S. 1, 10 (1984); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

Preemption of anti-arbitration state laws extends to any transaction "involving commerce," since Congress intended the Act's reach to be coextensive with that of the Commerce Clause. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 274 (1995). Because the FAA provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause, it governs every transaction "within the flow of interstate commerce." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003).

Likewise, because of the strong Federal policy favoring arbitration, statutory claims, even those involving "important social policies," are subject to arbitration. *Green Tree Finanical Corp.-Alabama v. Randolph*, 531 U.S. 79, 89–90 (2000).

The ultimate goal of the Federal Arbitration Act is to ensure "'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995), quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489

U.S. 468, 478 (1989). In furtherance of that goal, all doubt as to the scope of arbitrable issues is to be resolved in favor of arbitration. *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 24–25 (1983); *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 407 n.2 (2003); *Green Tree Financial Corp. v. Bazzle.* 539 U.S. 444, 452 (2003).

A. Under the FAA, the Arbitrator Decides Issues of Legality of the Entire Contract

The sole legal basis for Judge Ferrer's resistance to arbitration is his claim that the *entire contract* is void under California Labor Code §1700 *et. seq.*, also known as the Talent Agencies Act. Pet. App. 3a–10a; J.A. 23, 26–29.

This argument was adopted and articulated as the basis for decision by the Los Angeles Superior Court (Pet. App. 18a–27a) and it formed an essential link in the chain of reasoning of the California Court of Appeal. Pet. App. 6a–10a.

Petitioner respectfully submits that the Court of Appeal erred, because only attacks on the *arbitration agreement itself* are decided by the judiciary, whereas allegations that the *entire contract* is void or illegal are decided by the arbitrator. *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–404 (1967).

As stated in *Buckeye, supra,* 546 U.S. at

445–446:

> [A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. . . .[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.... [T]his arbitration law applies in state as well as federal courts. . . .[B]ecause respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court.

B. State Law Abrogation of the Right to Arbitrate is Subject to FAA Preemption

The California Court of Appeal distinguished *Buckeye* on the grounds that *Buckeye* involved abrogation of the right to arbitrate in favor of a *judicial* forum, whereas Judge Ferrer sought to require adjudication of his attack on the entire contract before an *administrative* tribunal. Pet. App. 10a–11a.

However, the reasoning of the Court of Appeal clashes with *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991) ("*Gilmer*"), wherein

this Court ordered arbitration of a claim based on the Age Discrimination in Employment Act ("ADEA").

In *Gilmer,* like this case, an adm inistrative agency (the EEOC) had initial jurisdiction and private claimants had an obligation to exhaust administrative remedies before proceeding to court. *Gilmer*, supra, 500 U.S. at 27. Despite the exclusive administrative jurisdiction of the EEOC, this Court held that the employee would be required to arbitrate his ADEA claim:

> We. . .are unpersuaded by the argument that arbitration will undermine the role of the EEOC in enforcing the ADEA. . . . [T]he mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration. For example, the Securities Exchange Commission is heavily involved in the enforcement of the Securities Exchange Act of 1934 and the Securities Act of 1933, but we have held that claims under both of those statutes may be subject to compulsory arbitration. *See Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

Gilmer, supra, 500 U.S. at 28–29.

The present matter is analogous to *Gilmer*. On its face, Judge Ferrer's Petition to the Labor Commissioner is nothing more than a private, civil pleading, seeking an adjudication that the *entire contract is invalid* and, based thereon, a ruling that Respondent does not have to honor his promise to arbitrate. J.A. 20–23.

The fact that Judge Ferrer was the Petitioner in the Labor Commissioner proceeding (*Id.*) and he was Plaintiff in the Superior Court action (J.A. 26) distinguishes this case from *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279 (2002)("*Waffle House*"), where the EEOC filed an enforcement action *in its own name*. The decision in *Waffle House* clearly turned on the identity of the EEOC as the *named Plaintiff*, and its status as non-signatory to the arbitration agreement. *Waffle House*, *supra*, 534 U.S. at 294. By contrast, in this matter the Labor Commissioner is *not a party*; Judge Ferrer filed the administrative and the judicial actions in his own name. J.A. 26.

Petitioner submits that *Waffle House* ultimately hinges on the exercise of *discretion* by the administrative enforcement agency. As noted in the *Waffle House* opinion, the EEOC received 79,896 charges of employment discrimination in 2000, but filed only 291 lawsuits. *Waffle House*, *supra*, 534 U.S. at 290 n.7. As such, the EEOC exercised considerable discretion in deciding which cases to pursue, and allocated its resources to prosecute cases *in its own name* only when those cases were likely to benefit the public in general. Once that decision was made, the

EEOC could proceed to court and it was not bound by any private arbitration agreements.

Here, by contrast, the Labor Commissioner did not file an action in her own name. Based on Judge Ferrer's pleading, the hearing officer merely found there was a "colorable" case based on Judge Ferrer's pleadings (J.A. 32–33), but there was never any evaluation of evidence, much less any decision by the Labor Commissioner to file a lawsuit in her own name.

As such, this case is analogous to *Gilmer*, and not *Waffle House*.

The specific question of whether the existence of an administrative tribunal negates the right to arbitrate was heard and decided in *Saturn Distribution Corporation v. Paramount Saturn, Ltd.*, 326 F.3d 684 (5th Cir. 2003), a case wherein the party resisting arbitration asserted that the Texas Motor Vehicles Board ("TMVB") had exclusive jurisdiction to hear the case. The United States Court of Appeals for the Fifth Circuit rejected that theory, holding:

> There are no legal restraints external to the parties' arbitration agreement that foreclose the arbitration of their dispute because the TMVB does not have exclusive jurisdiction of contractual disputes between franchisors and franchisees in the motor vehicle industry. [citations] Even if it did, the strong federal policy favoring arbitration

> preempts state laws that act to limit the availability of arbitration. *Southland Corp. v. Keating*, 465 U.S. 1, 16, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) (holding that through the FAA, "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements"); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) (discussing the holding and continued vitality of *Southland*).

Saturn Distribution Corporation, supra, 326 F.3d at 687.

In *Perry v. Thomas, supra*, 482 U.S. at 490–491, this Court invalidated another provision of the California Labor Code which purported to abrogate private arbitration agreements:

> [T]he present appeal addresses the pre-emptive effect of the Federal Arbitration Act, a statute that embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause. . . .This clear federal policy places § 2 of the Act in unmistakable conflict with California's [Labor Code] § 229 requirement that litigants be provided a judicial forum for resolving wage disputes. Therefore, under the Supremacy Clause, the state statute must give way.

C. The Express Intent of the Parties Was That the Arbitrator Shall Decide the Validity Issue

It is now well settled that the primary purpose of the Federal Arbitration Act is to ensure that private agreements to arbitrate "'are enforced according to their terms.'" *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995), quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989).

Applying that doctrine to Messrs. Preston and Ferrer is simple, because the Management Agreement expressly states that the "validity or legality" of the contract is subject to arbitration:

> . . . In the event of any dispute under or relating to the terms of this agreement, or the breach, *validity, or legality thereof*, it is agreed that the same shall be submitted to arbitration to the American Arbitration Association in the city of Los Angeles, California, and in accordance with the rules promulgated by the said association. . . .

J.A. 17, ¶13 (Emphasis added).

Even if the "validity or legality" language was not present, the Preston/Ferrer agreement *incorporates the AAA Rules*, and those Rules contain an express agreement to arbitrate issues of the "validity" of the

contract. The relevant provisions in the AAA Commercial Rules state:

> R-7. Jurisdiction
>
> (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.
>
> (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
>
> (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

See http://www.adr.org/sp.asp.

The incorporation of the AAA Rules has been discussed in several recent cases, and a body of case law has emerged that such "incorporation" of the Rules vests the arbitrator with the power to decide issues of arbitrability. As stated in *Terminix International Company, LP v. Palmer Ranch Limited Partnership*, 432 F.3d 1327, 1329, 1332 (11th Cir. 2005):

> This is another arbitration dispute in which the parties are litigating whether or not they should be litigating. The familiar scenario is that the parties agree in writing to arbitrate any disputes between them, but then one party files a lawsuit taking the position that the agreement to arbitrate is inapplicable, invalid, or unenforceable for one reason or another. . . .
>
> Here, we are able to avoid the usual process. . .[because] the parties have agreed that the arbitrator will answer this question, by providing (in all three of the arbitration clauses at issue) that "arbitration shall be conducted in accordance with the Commercial Arbitration Rules. . .of the American Arbitration Association". . .[and the AAA Rules provide that] "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the. . .validity of the arbitration agreement.". . . .By incorporating the AAA Rules. . .the

> parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid.

See also, Qualcomm Incorporated v. Nokia Corporation, 466 F.3d 1366, 1373 (Fed.Cir. 2006)("[T]he 2001 Agreement, which incorporates the AAA Rules...clearly and unmistakably shows the parties' intent to delegate the issue of determining arbitrability to an arbitrator."); *Contec Corporation v. Remote Solution Co., Ltd.*, 398 F.3d 205, 208 (2d Cir. 2005) (incorporation of Rule 7 of the AAA Commercial Arbitration Rules serves as "clear and unmistakable evidence of the parties' intent" to arbitrate validity of the contract and arbitrability of issues); *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPARTNERS, Inc.*, 203 F.R.D. 677, 685 (S.D.Fla.,2001)("[T]he parties contracted via. . . incorporation. . .the Rules of the AAA. . . .Under [former AAA] Rules 1 and 8, the Arbitrators have the authority over arbitrability determinations and other jurisdictional questions.").

The requirement of judicial deference to the intent of parties who have agreed to "arbitrate arbitrability" was articulated by a unanimous Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995):

> We believe the answer to the "who" question. . . is fairly simple. Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, see, e.g.,

> *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 115 S.Ct. 1212, 1216, 131 L.Ed.2d 76 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 3353, 87 L.Ed.2d 444 (1985), so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. See *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986) (parties may agree to arbitrate arbitrability); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 583, n. 7, 80 S.Ct. 1347, 1353, n. 7, 4 L.Ed.2d 1409 (1960) (same). That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. *See, e.g.*, 9 U.S.C. § 10.

If Judge Ferrer had honored his promise to arbitrate, including the specific promise to arbitrate the "validity or legality" of the contract, this case would have been expeditiously and economically

resolved at a two-day hearing on January 26 and 27, 2006. J.A. 30. Instead, the matter has been contested before the Arbitrator, the Labor Commissioner, the Los Angeles Superior Court, the California Court of Appeal, the California Supreme Court, and now before the highest Court in the land.

Congress' goal in enacting the Federal Arbitration Act was to enforce private arbitration agreements according to their terms, on a uniform, nationwide basis, and thereby provide for the efficient, expeditious, and economical resolution of disputes. As illustrated by this case, that goal is utterly defeated by denying the arbitral forum based on state law.

As stated by California Court of Appeal Justice Miriam Vogel, in her dissent:

> When a former judge and a lawyer enter a contract in which they agree that any dispute about that contract will be resolved by arbitration, I think they ought to be bound by that agreement. . .
>
> Instead of the speedy, efficient, and relatively inexpensive procedure contemplated by the parties' contract, my colleagues have permitted Ferrer to cause a delay of years and triple or quadruple the parties' expenditures. . . .That is not how it is supposed to work.

Pet. App. 12a, 17a.

CONCLUSION

The judgment of the California Court of Appeal should be *reversed*.

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IN THE

Supreme Court of the United States

ARNOLD M. PRESTON,

Petitioner,

v.

ALEX E. FERRER,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts the California Labor Commissioner's jurisdiction under the California Talent Agencies Act ("TAA") to conduct an administrative hearing and determine whether an individual has violated the TAA, which determination is subject to *de novo* review by a court or arbitrator.

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PRELIMINARY STATEMENT

This case arises from a controversy between Judge Alex E. Ferrer ("Ferrer"), who sought employment for the first time in the television industry, and Arnold M. Preston ("Preston"), who attempted to procure employment for Ferrer in that industry. Holding himself out as a talent agent, Preston set up a meeting between Ferrer and several television network executives and producers. Hours before the meeting, Preston insisted that Ferrer sign a contract (the "Contract") entitling Preston to a sizeable commission stemming from any employment that Ferrer obtained as a result of the meeting. Although Ferrer did not obtain employment as a result of the meeting, Ferrer later became employed in the television industry working with two of the producers that he met at the meeting.

In the Contract, Preston refers to himself as a "manager." Under the California Talent Agencies Act, CAL. LAB. CODE § 1700, *et. seq.* ("TAA" or "Act"), however, anyone who procures or attempts to procure employment for an artist in the television, stage, or motion picture industry is a "talent agency," and must be licensed by the California Labor Commissioner ("Commissioner"). Although Preston attempted to procure employment for Ferrer, Preston was not a licensed talent agent, and the Contract that Preston presented to Ferrer had not been approved by the Commissioner as also required by the TAA. Subsequently, even though (i) Preston never actually procured employment for Ferrer; (ii) Preston was not a licensed talent agent under the TAA; and (iii) Preston's Contract did not comply with the TAA,

Preston nevertheless insisted that Ferrer pay him a commission for the television employment that Ferrer later obtained.

Under the TAA, the Commissioner has jurisdiction to hold an administrative hearing and determine whether Preston violated the TAA by, among other things, operating as an unlicensed talent agent. CAL. LAB. CODE § 1700.44. If the Commissioner finds that Preston violated the TAA, she may then determine that the Contract is void, and may take additional action as set forth in the Act. Following the Commissioner's determination, either party may, as a matter of right, obtain a *de novo* hearing in the California Superior Court. Alternatively, following the Commissioner's determination, either party may move in the Superior Court to have the matter resolved *de novo* by an arbitrator if the parties have a valid arbitration agreement. Under California law, the Superior Court must grant a motion to compel arbitration if a valid arbitration clause exists. Thus, compliance with the TAA *does not preclude arbitration* of a dispute if the parties have agreed to arbitrate. Rather, at most, the TAA merely postpones arbitration pending completion of the Commissioner's initial inquiry.

The Contract between Preston and Ferrer that Preston drafted has an arbitration clause. JA 17-18. Accordingly, if the clause is valid and applicable, the parties may proceed to arbitration if either of them is dissatisfied with the Commissioner's determination. If so, an arbitrator, rather than a court, will resolve the controversy *de novo*.

Long recognized as "the center of the entertainment industry," *Sinatra v. National Enquirer*, 854 F.2d 1191, 1202 (9th Cir. 1988), California has a strong interest in regulating relations between artists and those who procure, or attempt to procure, employment for them. Drawing on nearly a century of regulatory experience, California enacted and maintains the TAA to prevent a broad variety of abusive practices and ensure the smooth functioning of an industry vital to its economy. Employing the expert office of the Commissioner to closely supervise, monitor, and adjust relations between agents and artists, the TAA aims to (i) avoid and deter illegal activities harmful to the industry, (ii) promote the expeditious resolution of controversies, (iii) vindicate the Commissioner's comprehensive authority, and (iv) keep the Commissioner apprised of relevant controversies. Given that the TAA expressly permits an arbitrator to resolve a controversy *de novo* following the Commissioner's review, it cannot be said that the TAA either effectively precludes arbitration or otherwise obstructs the Federal Arbitration Act ("FAA"). On the contrary, by requiring the Commissioner's expert resolution without constraining the outcome of any subsequent arbitration proceeding, the TAA actually promotes efficient, informed arbitration.

In this case, the lower court determined only that (i) under the TAA, the Commissioner may proceed with her inquiry before the parties litigate or arbitrate their dispute; and (ii) the FAA does not preempt the Commissioner's jurisdiction to make an initial determination. Pet. App. 6a-7a (determining that "[t]he administrative procedures before the

Commissioner must be resolved before resort may be had to another tribunal," and that it makes no difference whether a party "commenced an arbitration seeking damages" or "the action was initiated in superior court"); 10a-11a (concluding that there is no preemption of administrative procedures). Indeed, these were the only issues that the lower court in this case *could* decide, given that the Commissioner had not completed her review at the time, and the question whether to arbitrate or litigate following the Commissioner's determination had not yet arisen, much less been resolved. Thus, contrary to the assertions of Preston and his *amici*, no court in this case determined that that the Superior Court would conduct a *de novo* hearing, and this case does not involve a lower court's invalidation of an arbitration clause. Rather, this case involves merely the postponement of arbitration to permit the Commissioner to perform her administrative, regulatory function. Critically, this is precisely what Preston bargained for in the very Contract that he drafted.

The Contract specifically provides that "[t]his agreement shall be governed by the laws of the state of California." JA 17. It further provides that "[i]f there is any conflict between this agreement and any present or future law, the latter shall prevail." JA 18. In *Volt Information Science, Inc. v. Board of Trustees*, 489 U.S. 468 (1989), the Court addressed virtually identical contractual terms and a similar California rule postponing arbitration. In *Volt*, the parties agreed that their contract would be governed by California law. The Court determined that the parties thereby agreed to be bound by a California

procedural rule that permitted a stay of arbitration pending the outcome of related litigation. The Court held that the FAA did not preempt the procedural rule that postponed arbitration, and the same reasoning applies here. As noted, the TAA does not prevent arbitration; at most, it simply postpones it. By selecting California law to govern his Contract, Preston agreed to be bound by the TAA procedure. Because the FAA aims to *enforce* contractual agreements concerning arbitration, Preston's preemption argument necessarily fails since recognizing the Commissioner's initial jurisdiction requires nothing more than enforcing the Contract itself.

Preston's preemption argument also fails because, even if he had not bargained for application of the TAA procedure at issue here, there is no conflict between the relevant federal and state laws. First, the TAA is a comprehensive exercise of California's police power designed to regulate an industry that, historically, was fraught with abuse. Accordingly, the presumption against preemption applies. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

Second, no conflict exists because Ferrer does not argue, and the TAA does not provide, that arbitration may never take place. On the contrary, if the parties' arbitration clause is valid and applicable, arbitration will take place after the Commissioner completes her inquiry if a party dissatisfied with the Commissioner's determination pursues his absolute right to seek a *de novo* hearing. A state rule that merely postpones arbitration to permit an administrative hearing to take place does not conflict with the FAA.

Third, the Labor Commissioner's review is informal, expeditious, and subject to complete *de novo* review. As a result, it does not tie the hands of the arbitrator, who is left, as between the parties, to fashion the ultimate remedy. At the same time, as between the parties and the State, the TAA procedure permits the Commissioner to exercise her administrative, regulatory authority to conduct an investigation, make an initial determination whether the TAA has been violated, and take appropriate administrative action – an authority that private parties are powerless to negate by contract. The TAA procedure here is analogous to other kinds of agency authority and action that the Court has held does not conflict with the FAA. *See, e.g., EEOC v. WaffleHouse, Inc.*, 534 U.S. 279, 288 (2002). For these reasons, the Court should affirm the decision below.

STATEMENT

A. Factual Background

Ferrer is a former Florida Superior Court Judge who currently arbitrates legal disputes on the nationally syndicated television program *Judge Alex*. Preston is an attorney who has never been a licensed talent agent.

In early 2002, an acquaintance gave Preston's name to Ferrer, and Ferrer contacted Preston to inquire about seeking employment in the television industry. After some discussions, Ferrer sent materials to Preston and Preston circulated these materials to persons in the television business, attempting to procure employment for Ferrer. Preston subse-

quently contacted Ferrer and informed him that executives at a television network were interested in meeting him in California. Ferrer, who was on vacation, modified his travel plans and arranged to fly to Los Angeles for the meeting.

Just before Ferrer left for Los Angeles, Preston faxed the Contract to Ferrer's hotel and informed Ferrer that there would be no meeting unless Ferrer signed it. As originally drafted, the Contract would have entitled Preston to receive a commission for any employment that Ferrer obtained in the entertainment industry, regardless of whether Preston procured the employment for Ferrer. Ferrer objected, and the parties negotiated certain hand-written changes to the agreement limiting Preston's commission to a percentage of income that Ferrer obtained from employment resulting from the specific meeting that Preston had arranged. JA 11-12. Ferrer executed the Contract on March 7, 2002. The Contract expressly provides that "[t]his agreement shall be governed by the laws of the state of California," JA 17, and that "[i]f there is any conflict between this agreement and any present or future law, the latter shall prevail," JA 18.

On March 8, 2002, Ferrer attended the meeting that Preston had arranged. Preston, however, did not attend. Although the network expressed interest in Ferrer, the parties did not ultimately reach agreement on the terms of any employment for Ferrer. At the time of the meeting, Ferrer was unaware that Preston was acting unlawfully as an unlicensed talent agent.

Over a year later, Ferrer was contacted by two of the producers who had attended the meeting on March 8, 2002 about possible employment in the television industry. Ferrer and the two producers ultimately reached an agreement with Twentieth Television to produce the *Judge Alex* show. Preston thereafter claimed to be entitled to a commission as a result of Ferrer's engagement with Twentieth Television.

B. The California Talent Agencies Act

The TAA is a remedial statute, enacted to "protect artists seeking professional employment from the abuses of talent agencies." *Styne v. Stevens*, 26 Cal. 4th 42, 50 (2001). Specifically, it regulates the activities of talent agents to prevent inexperienced actors, actresses, and other artists from falling prey to exploitation by those who seek to capitalize on their inexperience. *Id.* at 58. Given California's status as an entertainment center, California has a strong interest in promoting the smooth functioning of the entertainment industry, including the regulation of relations between agents and artists vital to that industry.

The TAA has a long history and is comprehensive in scope.[1] It applies to a "talent agency," defined in

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[1] As one commentator has observed, "[f]or almost a hundred years, Southern California has been known as a bastion of artistic talent and as an avid protector of artists' rights." Gary E. Devlin, Note, *The Talent Agencies Act: Reconciling the Controversies Surrounding Lawyers, Managers, and Agents Participating in California's Entertainment Industry*, 28 PEPP. L. REV. 381

relevant part as "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists." CAL. LAB. CODE § 1700.4. The TAA defines an "artist" as a person who renders "professional services in . . . television and other entertainment enterprises." *Id.* Essentially anyone who procures, or attempts to procure, employment for an artist in the television, stage, or motion picture business is a talent agent within the meaning of the TAA and is subject to its provisions.[2]

The function of a talent agent under the TAA is distinct from that of a "manager." In the entertainment industry, a manager commonly performs a variety of services for an artist, such as career counseling and publicity consulting. As the TAA makes plain, however, any individual who procures, or attempts to procure, *employment* for an artist in the television, stage, or motion picture industry falls within the definition of a "talent agency" under the Act irrespective of what he calls himself. In other words, the label a person uses to describe what he does for an artist is not controlling; anyone who procures, or attempts to procure, employment for an art-

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(2001). The current version of the TAA traces its origins to California's 1913 Private Employment Agencies Law. *Id.* at 387.

[2] The statutory definition of "talent agency" makes plain that it includes within its scope an individual who procures, or attempts to procure, employment for an artist. For simplicity, this brief refers to an individual who qualifies as a "talent agency" as a "talent agent."

ist in the television, stage, or motion picture business acts as a "talent agency" and is subject to the TAA's requirements. In this case, Preston attempted to procure employment for Ferrer in the television business – indeed, that is *all* that Preston did for Ferrer. Accordingly, Preston acted as a talent agent within the meaning of the TAA, notwithstanding that he labeled himself a "manager" in the Contract.

The TAA directs that "[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." CAL. LAB. CODE § 1700.5. To obtain a license, an individual must submit an application, accompanied by two sets of fingerprints and certifications from residents of the location where the agent will operate attesting to the agent's "reputation for fair dealing" and "good moral character." *Id.* § 1700.6. The individual must also post a surety bond with the Commissioner in the amount of $50,000, *id.* § 1700.15, the proceeds of which are available to cover any damages occasioned by the agent's "misstatement, misrepresentation, fraud, deceit, or any unlawful acts or omissions of the licensed talent agency," *id.* § 1700.16. A talent agency may not change location without the Commissioner's consent. *Id.* § 1700.13.

Before issuing a license, the Commissioner may conduct an investigation "as to the character and responsibility of the applicant." CAL. LAB. CODE § 1700.7. The Commissioner may deny an application, *id.* § 1700.8, and must do so under certain circumstances, *id.* § 1700.9. The Commissioner may also revoke a license for, among other things, the

agent's failure to comply with the TAA's requirements. *Id.* § 1700.21. In addition, the Commissioner may collect fines for violation of the TAA. *Id.* § 1700.18. Licenses are issued on an annual basis and must be renewed each year. *Id.* § 1700.10. Licenses are not transferable without the Commissioner's consent. *Id.* § 1700.20.

Every talent agency is required to submit its contracts, or forms of contracts, to the Commissioner for prior approval. CAL. LAB. CODE § 1700.23. The Commissioner may withhold approval if, among other things, the terms are "unfair, unjust and oppressive to the artist." *Id.* Emphasizing the supervisory role of the Commissioner, the TAA further provides that "[e]very such form of contract . . . shall contain an agreement by the talent agency to refer any controversy between the artist and the talent agency relating to the terms of the contract to the Labor Commissioner for adjustment." *Id.*

Every talent agency is required to file with the Commissioner and post in conspicuous view all fees that it charges, CAL. LAB. CODE § 1700.24, and certain fees and charges are expressly prohibited, *id.* § 1700.40. Fees and charges are not effective until after they are filed with the Commissioner and posted as required by the Act. *Id.* § 1700.24. The TAA likewise contains regulations concerning conflicts of interest, and proscribes certain referral fees. *Id.* § 1700.40. Talent agencies are also required to maintain various records and must hold funds col-

lected on behalf of artists in trust. *Id.* §§ 1700.25, 1700.26.[3] The Commissioner has the right to inspect the agency's books and records, and to receive copies upon request. *Id.* § 1700.27. Restrictions apply to an agency's advertisements, *id.* § 1700.32, and health and safety limitations also apply, *id.* §§ 1700.33, 1700.34, 1700.35, 1700.36.

It is undisputed that Preston complied with none of these requirements. Although he clearly and repeatedly sought to procure employment for Ferrer in the television industry, he neither obtained a license to do so, nor submitted his Contract to the Commissioner for approval. He also failed to file and disclose his fees and charges prior to presenting them to Ferrer, instead waiting until just before the meeting on March 8, 2002 to rush Ferrer into signing the Contract.

C. The Commissioner's Investigation And Review Under The TAA

Section 1700.44 of the TAA provides that "[i]n cases of controversy under this chapter, the parties involved shall refer the matters in dispute to the La-

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[3] It is customary in the industry for a talent agent to collect funds directly from an artist's employer, deduct the agent's commission, and then remit the balance to the artist. Thus, the TAA has specific trust fund and accounting requirements to prevent abuse. In contrast, a "manager" is not supposed to procure employment for artists and does not typically fulfill the collection and disbursement function normally performed by an agent. There is thus correspondingly less need to regulate a manager's activities.

bor Commissioner, who shall hear and determine the same." CAL. LAB. CODE § 1700.44. Although this provision plainly vests the Commissioner with initial jurisdiction to determine whether a violation of the TAA has occurred, the Commissioner's determination is expressly subject to *de novo* resolution in the California Superior Court. *Id.* Specifically, any party that disagrees with the Commissioner's resolution of a controversy may file a notice of appeal with the Superior Court within ten days of the Commissioner's determination. *Id.*; *Sinnamon v. McKay*, 142 Cal. App. 3d 847, 850 (1983).

Once the matter vests in the Superior Court, either party may move to compel arbitration if the parties have agreed to arbitrate their dispute. CAL. CIV. PROC. CODE § 1281.2.[4] Following an appeal of the Commissioner's determination to the Superior Court, the court is required to grant a motion compelling arbitration if the parties have executed a valid and applicable arbitration agreement. *Id.*; *see Rosenthal v. Great Western Fin. Secs. Corp.*, 14 Cal. 4th 394, 413 (1996). Significantly, section 1281 of the California Code of Civil Procedure, applicable to proceedings in the Superior Court and incorporated into the

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[4] Section 1281.2 provides in pertinent part that "[o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists." CAL. CIV. PROC. CODE § 1281.2.

TAA by reference in section 1700.45,[5] is virtually identical to section 2 of the FAA. *Compare* CAL. CIV. PROC. CODE § 1281 ("A written agreement to submit to arbitration . . . a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.") *with* 9 U.S.C. § 2 ("A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

It is evident that section 1700.44 of the TAA does not, in fact, invalidate an arbitration agreement or prevent arbitration of a controversy arising under its provisions. Rather, the TAA simply vests the Commissioner with initial administrative jurisdiction to determine if the TAA has been violated, subject to *de novo* resolution (i) in the Superior Court if the parties have not agreed to arbitrate, or (ii) by an arbitrator if they have. Thus, at most, the TAA may postpone arbitration in a particular case; it does not preclude or invalidate an otherwise enforceable arbitration agreement.

Further, under section 1700.45 of the TAA, a licensed talent agent and an artist may avoid the

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[5] Section 1700.45 provides in pertinent part that "[e]xcept as otherwise provided in this section, any arbitration shall be governed by the provisions of Title 9 (commencing with section 1280) of Part 3 of the Code of Civil Procedure." CAL. LAB. CODE § 1700.45.

Commissioner's initial review altogether and proceed directly to arbitration if they provide in their contract that they will give notice of any arbitration proceeding to the Commissioner and permit the Commissioner (or her representative) to attend. CAL. LAB. CODE § 1700.45; *Styne*, 26 Cal. 4th at 59 n.9 ("[T]he [TAA] specifically allows parties to provide in their contract that disputes thereunder shall be resolved by private arbitration, rather than by the Commissioner. (§ 1700.45)."). It is undisputed that Preston was not a licensed talent agent and that he failed to comply with these requirements in drafting the Contract. Accordingly, section 1700.45 of the TAA does not apply. Pet. App. 8a-9a.

Proceedings before the Commissioner are informal and expeditious. They are administrative in nature, governed by relevant parts of the California Code of Regulations. *See* CAL. CODE REGS. tit. 8, §§ 12022-12033 (2007). A party commences the proceeding by filing a petition, and formal pleading rules that govern proceedings in the California courts do not apply. *Id.* § 12022. The Commissioner typically schedules a hearing several months after the petition is filed. Discovery prior to the hearing is not ordinarily permitted. *Id.* § 12028. Although the parties may present evidence at the hearing (including witnesses), formal rules of evidence that govern proceedings in the California courts do not apply. *Id.* § 12031. If the Commissioner determines that the TAA has been violated, the Commissioner may refer the violation to the enforcement arm of the Labor Department, which may take administrative action,

including the commencement of license-revocation proceedings.

As noted, the Commissioner has broad oversight authority over contracts between talent agencies and artists. Among other things, agents must submit these contracts to the Commissioner for approval. CAL. LAB. CODE § 1700.23. Given the Commissioner's role in closely supervising relations between talent agencies and artists, the Commissioner also has broad authority to interpret their agreements and apply the provisions of the TAA. *Id.* § 1700.44. The Commissioner also has an overriding interest in policing individuals who act as talent agents without complying with the TAA's requirements. Inherent in this function is the ability to determine whether the TAA applies to the activities of a particular individual, and whether the individual has violated any of the requirements of the Act. *See Styne*, 26 Cal. 4th at 54-55 (explaining that "[w]hen the [TAA] is invoked in the course of a contract dispute, the Commissioner has exclusive jurisdiction to determine his jurisdiction over the matter, including whether the contract involved the services of a talent agency" and that "[h]aving so determined, the Commissioner may declare the contract void and unenforceable as involving the services of an unlicensed person in violation of the Act") (citations omitted), *id.* at 58 (discussing Commissioner's role).

D. The Federal Arbitration Act

Enacted in 1925, the FAA was intended to overcome judicial resistance to arbitration, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443

(2006), by, among other things, overruling the "ouster doctrine" that federal courts had invoked to disregard otherwise valid arbitration agreements, H.R. REP. NO. 68-96, at 1-2 (1924); S. REP. NO. 68-536, at 2 (1924).[6]

After the Court's ruling in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (holding that, absent a pertinent state statute, federal common law, rather than state common law, governed in diversity cases), *overruled by Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts treated arbitration as remedial and procedural in nature, and therefore governed by the procedural law of the forum court, rather than as part of the substantive state law governing the general enforceability of the particular contract containing an arbitration clause. Adopting their own procedural rules, such as the ouster doctrine, federal courts often declined to enforce arbitration agreements as contrary to their own system of procedures and remedies. *See, e.g., Mitchell v. Dougherty*, 90 F. 639,

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[6] The ouster doctrine provided that "any agreement contained in an executory contract, ousting in advance all courts of every whit of jurisdiction to decide contests arising out of that contract, will not be enforced by the courts so ousted." Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 332 (2007) (citation omitted); *see, e.g., Vynior's Case*, 77 Eng. Rep. 595, 595-96 (K.B. 1609); *see also* Meacham *v. Jamestown, Franklin & Clearfield R.R. Co.*, 211 N.Y. 346, 354 (1914) (Cardozo, J., concurring) ("If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes.").

645 (3d Cir. 1898) (refusing to enforce arbitration, stating that "[t]he question before us is not as to the enforcement of the contract in accordance with the law of the place where it was made, but is as to whether a court of the United States should, because of the parties' agreement in advance to abstain from invoking its jurisdiction, refuse to enforce the contract at all").

Although currently there are competing views on the purpose and proper interpretation of the FAA, the best evidence is that Congress did not enact the statute to change the then well-established treatment of arbitration as remedial and procedural in nature, and therefore governed by the procedural law of the forum court. As the committee report accompanying the draft FAA explained without criticism, "[w]hether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made." H.R. REP. NO. 68-96, at 1-2 (1924).

Nor was the FAA enacted to impose a substantive national arbitration law on the States. As Julius Cohen, the principal draftsperson of the legislation, testified,"[t]here is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement." *Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 40 (1924) ("Joint Hearings").

Rather, the record illustrates that Congress enacted the FAA simply to change the procedural rules of the federal courts to include rules providing for the enforceability and implementation of arbitration clauses in the federal courts. *See, e.g.*, H.R. REP. NO. 68-96, at 1-2 (1924) ("Before [arbitration agreements] could be enforced in the Federal courts, therefore, this law is essential. The bill declares that such agreements shall be recognized and enforced by the courts of the United States.").

Consistent with this purpose, the FAA contains no express provision preempting state arbitration laws; likewise, it does not purport to occupy the entire field of arbitration, *Volt*, 489 U.S. at 477. Rather, it simply overrules such practices as the ouster doctrine as a procedural preference in the federal courts. Specifically, section 2 of the FAA provides in pertinent part:

> A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. Likewise, in section 4, the FAA directs federal courts to enforce arbitration agreements, but only in cases in which they otherwise have jurisdiction over the suit between the parties:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a

> written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4. Following section 4, the balance of the FAA supplies largely procedural rules for implementing arbitration agreements in federal court.

E. The Proceedings Below

As noted, even though (i) Preston never actually procured employment for Ferrer; (ii) Preston was not a licensed talent agent; and (iii) Preston's Contract did not comply with the TAA, Preston insists that Ferrer pay him a commission for Ferrer's employment on the *Judge Alex* show. Rather than present his dispute in the first instance to the Commissioner as the TAA requires, however, Preston filed a demand for arbitration on June 4, 2005. JA 5-7.

On July 1, 2005, Ferrer filed a motion with the arbitrator to stay the arbitration, and on July 5, 2005, Ferrer filed a petition with the Commissioner to determine the controversy in the first instance. JA 20-23. Ferrer also requested that the Commissioner stay the arbitration.

On November 8, 2005, the Commissioner denied Preston's motion to dismiss Ferrer's petition for, among other things, lack of subject matter jurisdiction, stating that "this case presents a colorable basis for exercise of the Labor Commissioner's jurisdiction

and therefore, the matter must be submitted to the Labor Commissioner for determination." JA at 32-33; *see Styne*, 26 Cal. 4th at 59 n.10 (discussing what constitutes a "colorable" claim under the TAA). The Commissioner also declined to stay the arbitration on the ground that she lacked the authority to do so (that authority being vested exclusively in the California Superior Court), and the Commissioner set a hearing date for March 6, 2006. JA 32-33.

After the arbitrator denied Ferrer's motion to stay arbitration pending the Commissioner's review, JA 24, Ferrer moved in the Superior Court to enjoin arbitration, JA 26, 29. On December 6, 2005, the arbitrator reconsidered his prior order declining to stay the arbitration and entered an order staying arbitration. JA 34-38. In doing so, the arbitrator concluded that "the results of the Labor Commissioner hearing also could inform the Arbitrator as to the remedy or relief that would be just and equitable under the circumstances of this case." JA 38. On December 7, 2005, the Superior Court likewise entered an order staying arbitration pending the Commissioner's review. Pet. App. 26a-27a.

Preston appealed the Superior Court's order to the California Court of Appeal. On February 8, 2006, the parties stipulated to a stay of the Commissioner's review pending the outcome of the appellate process. JA 39-40.

F. The Decision Below

On November 30, 2006, the Court of Appeal affirmed the trial court's order staying arbitration. Pet. App. 2a, 12a. Stating that "the question before

us is who has original jurisdiction to make the determination as to the validity of the parties' contract," Pet. App. 6a, the court began its analysis by considering section 1700.44 of the TAA and the nature of the parties' dispute. Rejecting Preston's argument that the TAA did not apply on the theory that he was acting merely as a "manager" rather than a "talent agent," the court held that "it is appropriate for the Commissioner to resolve the dispute between the parties, for '[t]he Commissioner's expertise in applying the Act is particularly significant in cases where, as here, the essence of the parties' dispute is whether services were by a talent agency for an artist.'" Pet. App. 7a (quoting *Styne*, 26 Cal. 4th at 58). Agreeing with the Commissioner that the matter presented a colorable case for application of the TAA, the court concluded that "the questions as to whether [Preston] is a talent agent and whether his contract with [Ferrer] is valid properly are submitted to the Commissioner *in the first instance*." Pet. App. 10a (emphasis supplied).

Turning to the question whether the FAA preempts the Commissioner's jurisdiction under this Court's decision in *Buckeye*, the court held that *Buckeye* does not apply in this case. Reasoning that the proceedings before the Commissioner are a form of exhaustion of administrative remedies, the court noted that "*Buckeye* did not consider whether the FAA preempts application of the exhaustion doctrine." Pet. App. 10a. Acknowledging the "strong public policy in favor of contractual arbitration," the court concluded that Preston nevertheless could not

avoid his obligation to complete the administrative process required under the TAA. *Id.* 11a-12a.

On February 14, 2007, the California Supreme Court denied Preston's petition for review.

SUMMARY OF ARGUMENT

Preston and Ferrer agreed in their Contract to be bound by California law and, further, that any conflict between the Contract and applicable law must be resolved in favor of the latter. California law includes section 1700.44 of the TAA, which does not preclude arbitration where there is a valid and applicable arbitration clause, but merely postpones it pending the Commissioner's review. Because the parties agreed contractually to abide by this law, and because the TAA does not preclude arbitration, the FAA does not preempt the TAA's provisions. *Volt*, 489 U.S. at 479.

Even if the parties had not agreed in the Contract to be bound by California law, the FAA still does not preempt section 1700.44. The TAA represents an exercise of California's police power over an area traditionally reserved to the State. Accordingly, the presumption against preemption applies, and Preston may overcome the presumption only by demonstrating that preemption was Congress's clear and manifest purpose. *Medtronic*, 518 U.S. at 485. Preston cannot meet this burden.

There is no evidence that, in enacting the FAA, Congress intended to preempt administrative proceedings of the kind prescribed by the TAA. Further, no conflict exists between the FAA and the TAA suf-

ficient to justify a finding of preemption. Far from frustrating the purposes of the FAA, the TAA promotes expeditious, expert resolution of controversies arising under the TAA, while at the same time providing for ultimate *de novo* resolution of the controversy by a court or arbitrator. Accordingly, the two laws are in harmony and no finding of preemption is warranted.

Moreover, consistent with the Court's decision in *WaffleHouse*, there is no basis to conclude that, by entering into a private contractual arrangement, parties may preclude a governmental agency from investigating and conciliating claims entrusted to the agency for review. 534 U.S. at 288. Private parties have no power to disable the Commissioner's statutory function and remedial authority. That is all the more so in this case, where the Commissioner's determination is subject to *de novo* resolution by a court or arbitrator and, at most, the TAA merely postpones arbitration if the parties have entered into a valid and applicable arbitration agreement.

The Court's decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and its progeny, holding that the FAA preempts state laws that proscribe arbitration in certain categories of state court litigation, are not to the contrary and are readily distinguishable. The TAA does not proscribe arbitration, and *Southland* and its progeny do not address the question whether the FAA preempts agency review. To the extent the Court determines that *Southland* and its progeny apply to restrict or invalidate section 1700.44 of the TAA, the Court should reconsider and

either limit or overrule *Southland* and affirm the decision below.

Overturning an administrative agency's exercise of its statutory authority to investigate and conciliate claims is far removed from both the problem addressed in *Southland* and Congress's intent in enacting the FAA. In considering the reach of the FAA, the Court should balance the interests of the State and the purposes of the FAA, and should conclude that the FAA does not preempt state law because the state statute does not impair the basic purposes of the federal statute.

Alternatively, the Court should reconsider and overrule *Southland*. The text, history, purpose, and logic of the FAA demonstrate that Congress never intended it to apply to state court proceedings over state law issues. Because this is clear, and because the consequences of preemption are fundamentally disruptive to legitimate state regulatory procedures, *stare decisis* should not stand in the way of overturning the Court's precedent.

ARGUMENT

A. The FAA Does Not Preempt State Procedural Laws That The Parties Expressly Incorporate Into Their Contracts.

1. The principal purpose of the FAA is to enforce the parties' contract in accordance with its terms.

The FAA's "passage 'was motivated first and foremost, by a congressional desire to enforce agree-

ments into which parties had entered.'" *Volt*, 489 U.S. at 478 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985)). The FAA thus manifests congressional intent to place "[a]n arbitration agreement . . . upon the same footing as other contracts, where it belongs." *Southland*, 465 U.S. at 15-16 (citing H.R. REP. NO. 68-96, at 1 (1924)).

Consistent with these purposes, "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). As the Court has explained, "the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n.12 (1967). It is well settled, therefore, that "the FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." *Volt*, 489 U.S. at 478-79 ("[P]arties are generally free to structure their arbitration agreements as they see fit.") (citing *Byrd*, 470 U.S. at 219; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

Thus, determining the effect of the FAA on any dispute necessarily requires the Court to interpret and enforce the parties' contract as it does any other contract – under state law principles designed to give effect to the parties' intent. *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . .

should apply ordinary state-law principles that govern the formation of contracts."); *Volt*, 489 U.S. at 478 (stating that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms").

2. The FAA requires enforcement of contracts that expressly incorporate state law where, as here, state law merely postpones arbitration.

Consistent with the FAA's essential purpose, the Court expressly held in *Volt* that the FAA does not preempt California procedural laws where the parties bargained for California law to govern their disputes. 489 U.S. at 479. The *Volt* rule controls and requires affirmance of the decision below.

In *Volt*, the Board of Trustees of Leland Stanford Junior University ("Stanford") sued Volt Information Sciences, Inc. ("Volt") for allegedly breaching a construction contract between the parties. 489 U.S. at 470. The contract contained an arbitration clause requiring arbitration of all disputes "arising out of or relating to" their contract or any breach as well as a choice of law clause providing that "the Contract shall be governed by the law of the place where the Project is located," which was California. *Id.* Volt moved to compel arbitration of the dispute, and Stanford moved to stay arbitration pursuant to a California state law rule permitting any court "to stay arbitration pending resolution of a related litigation between a party to the arbitration agreement and third parties not bound by it, where 'there is a possibility of conflicting rulings on a common issue of law or

fact.'" *Id.* at 471 (quoting CAL. CIV. PROC. CODE § 1281.2(c) (1982)). The California Superior Court denied the motion to compel arbitration, finding that the FAA did not preempt state law. *Id.* The California Court of Appeal affirmed, and, after the California Supreme Court denied further review, this Court granted certiorari and also affirmed. *Id.* at 471-72.

The issue before the Court was "whether application of CAL. CIV. PROC. CODE ANN. § 1281.2(c) to stay arbitration under this contract in interstate commerce, in accordance with the terms of the arbitration agreement itself, would undermine the goals and policies of the FAA." 489 U.S. at 477-78. The Court answered that question in the negative. *Id.* at 478. In holding that the FAA did not preempt the California law at issue, the Court noted that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476. The Court reasoned that, although the FAA preempts state laws requiring a judicial forum for resolving claims that contracting parties agreed to arbitrate,

> it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms.

Id. at 479. Thus, the rule of *Volt* is that the FAA does not preempt state laws that the parties agreed

to follow in their contract, "even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward." *Id.*

Here, as in *Volt*, Preston and Ferrer agreed that their dispute would be governed by California law. JA 17. Indeed, the Contract is even clearer on this point than the agreement in *Volt*, which merely applied the "law of the place where the Project was located," which happened to be California. 489 U.S. at 472. The Contract further reinforces its clear incorporation of California law by including a provision in the arbitration clause itself expressly stating that any conflict between the Contract and applicable law must be resolved in favor of the latter. JA 18. Here the parties clearly agreed to be bound by the TAA. *See Chronus Investments, Inc. v. Colman*, 35 Cal. 4th 376, 387 (2005) (parties' selection of California law to govern their contract incorporates California's procedural rules applicable to arbitration). Under *Volt*, the FAA does not preempt the TAA because the Contract is enforceable under the FAA.

Neither party has ever disputed that California law governs here, and thus, the court below construed the parties' contract and resolved the appeal in accordance with state law, including the TAA. Pet. App. 5a-6a. That the parties agreed to follow California law is perhaps best exemplified by the fact that neither party invoked the FAA before the arbitrator, the Commissioner, or the Superior Court. In fact, in the proceedings in the Superior Court, Ferrer sought injunctive relief staying arbitration pursuant to California Code of Procedure §§ 526 and 527, and Preston moved to compel arbitration pursuant to

California Code of Procedure § 1281.2 – the very provision at issue in *Volt*. Pet. App. 20a. Neither party so much as mentioned the FAA until Preston inserted a three-paragraph argument concerning FAA preemption in his opening brief to the Court of Appeal. Given the parties' clear agreement to follow California law, the FAA, as applied in *Volt*, does not preempt the TAA, and the parties' Contract is enforceable under the FAA no less than in *Volt*.

Ignoring the choice of law and conflict provisions of the Contract discussed above, Preston contends that the parties agreed to have the arbitrator decide questions of arbitrability by incorporating the rules of the American Arbitration Association ("AAA") into the Contract. Pet. Br. at 17-22. Preston argues that, by doing so, the parties vested the arbitrator with exclusive authority to construe the validity of the Contract. *Id.* at 17. This argument misses the relevant point entirely. The question here is not *whether* the arbitrator may decide the validity of the Contract, but *when* he may decide it. Under *Volt*, the answer is that the parties must follow California law. And under the TAA, the Commissioner may decide first whether the Contract violates the TAA. Nothing in any of the provisions of the AAA are to the contrary or purport to override the TAA, and Preston does not argue that they are or do. In any event, even if there were such a conflict, the Contract itself expressly provides that, if any conflict arises between its provisions and applicable law, applicable law governs. Accordingly, any conflicting provision of the AAA would not control.

Southland and its progeny are not to the contrary. In *Southland*, the Court reversed the California Supreme Court's holding that claims arising under the California Franchise Law must be resolved in a judicial forum and may not be submitted to arbitration even if the claims fall within the scope of the parties' arbitration agreement. 465 U.S. at 5. The Court concluded that a State's placement of an entire category of disputes outside the province of arbitration conflicted with section 2 of the FAA, and, specifically, that "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 16. *Southland* is clearly distinguishable from this case.

First, *Southland* involved a state law rule that denied in its entirety the arbitrability of an entire category of state law disputes. In contrast, this case, like *Volt*, involves a state law rule that merely postpones arbitration. Second, *Southland* did not involve consideration of whether the parties agreed to be bound by a state law rule that requires the exhaustion of administrative remedies before proceeding to arbitration; this case does. Third, *Southland* simply did not consider whether Congress intended the FAA to preempt administrative agency action where, as here, full recourse to arbitration is ultimately preserved. As in *Volt*, this case involves an arbitration-postponing rule that the parties bargained for; not an arbitration-defeating rule at war with the parties' contractual arbitration agreement.

The Court's decision in *Buckeye* also is not to the contrary. There, the Court considered whether a court or arbitrator must decide the legality of a con-

tract where one party resists arbitration on the ground that the entire contract (as opposed to the arbitration clause itself) is void *ab initio* under state law. 546 U.S. at 442. The Court held that, where the challenge is to the legality of the entire contract and not the arbitration clause itself, the arbitrator normally decides the issue of the legality of the contract. *Id.* at 449. *Buckeye* is also entirely distinguishable.

First, like *Southland*, *Buckeye* involved a state law rule that denied in its entirety the arbitrability of an entire category of state law disputes – contracts that are allegedly void *ab initio* as a matter of state law. This case, of course, involves no such arbitration-defeating rule. Second, *Buckeye* did not involve consideration of whether the parties agreed to be bound by a state law rule that requires the exhaustion of administrative remedies before proceeding to arbitration. In *Buckeye*, the contract expressly provided that resolution of any dispute "shall be governed . . . [by] the Federal Arbitration Act," and that the arbitrator must apply the law "[consistent] with the FAA." *Id.* at 442-43. Here, in contrast, the parties agreed to be bound by California law, including, by incorporation, the TAA. Third, like *Southland*, *Buckeye* simply did not consider whether Congress intended the FAA to preempt administrative agency action where, as here, full recourse to arbitration is ultimately preserved.

Fairly construed, the Court's precedents reveal a clear dichotomy. On the one hand, the Court has overturned state laws that categorically prevent the arbitration of certain disputes. *See Buckeye*, 546

U.S. at 449; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (holding that the FAA preempted a Montana law rendering arbitration agreements unenforceable); *Mastrobuono*, 514 U.S. at 64 (holding that the FAA preempted decisional law eliminating the arbitrator's authority to award punitive damages); *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 282 (1995) (holding that the FAA preempted an Alabama law making written, predispute arbitration agreements unenforceable); *Perry v. Thomas*, 482 U.S. 483, 492 (1987) (holding that the FAA preempted a California wage law rendering particular arbitration agreements unenforceable); *Southland*, 465 U.S. at 16.

On the other hand, the FAA does not preempt state laws that the parties incorporate into their contract and that, although postponing or regulating arbitration, do not render the arbitration agreement unenforceable. *Volt*, 489 U.S. at 479 (holding that the FAA does not preempt "agreements to arbitrate under different rules than those set forth in the Act itself"); *see Doctor's Assocs.*, 517 U.S. at 688 ("*Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself."). This case falls clearly within the scope of *Volt*.

Indeed, for at least two reasons, the state law procedural rule at issue in this case (*i.e.*, section 1700.44 of the TAA, which postpones arbitration until after the Commissioner's review) is likely to have far less impact on arbitration than the procedural rule at issue in *Volt* (*i.e.*, CAL. CIV. PROC. CODE § 1281.2(c), which requires a stay of arbitration

pending the outcome of related litigation). First, proceedings before the Commissioner are typically informal and expeditious, lasting months rather than years. They are thus likely to result in far less delay than awaiting the outcome of related state or federal court litigation. In this case, the Commissioner scheduled a hearing to resolve the matter four months following her determination that she had jurisdiction to review the controversy. JA 33.[7]

Second, unlike proceedings before the Commissioner under the TAA, the outcome of related state or federal court litigation may have preclusive effects on an arbitration proceeding under applicable principles of estoppel. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331-32 (1979) (rejecting common law doctrine of mutuality of parties and authorizing offensive use of collateral estoppel). Thus, the rule postponing arbitration in favor of litigation at issue in *Volt* may have the effect of tying the arbitrator's hands. In contrast, the Commissioner's determination under the TAA is subject to *de novo* review and has no preclusive effect. Because the arbitration-postponing rule at issue in this case has less of an

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[7] In her dissenting opinion in the Court of Appeal, Judge Vogel speculated that proceeding before the Commissioner would "cause a delay of years and triple or quadruple the parties' expenditures." JA 17a. But there is no basis for this speculation in the record or otherwise. As noted, proceedings before the Commissioner are expeditious and informal and, thus, do not entail the expense or delay associated with trials or arbitration proceedings.

impact on arbitration than the rule upheld in *Volt*, the Court should affirm the decision below.

B. Under Established Principles, The FAA Does Not Preempt The Administrative Procedure Prescribed By Section 1700.44 Of The TAA.

"A fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000) (citing U.S. Const. art. VI, cl. 2; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)). The Court has applied this mandate by holding that federal law may preempt state law in three distinct ways: (i) by express language in a congressional enactment (express preemption), *e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992); (ii) by implication from the depth and breadth of a congressional scheme that occupies the legislative field (field preemption), *e.g., Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982), or (iii) by implication due to a conflict with a congressional enactment (conflict preemption), *e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-74 (2000). *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (discussing three types of preemption).

Because "[t]he FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration," *Volt*, 489 U.S. at 477, the relevant inquiry is one of conflict preemption only. As the Court has explained, conflict preemption exists "where it is impossible for a private party to comply with both state and federal

law, *see, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), and where "under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Crosby*, 530 U.S. at 372-73 (internal quotation marks, alterations, and citation omitted). The determination of "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Id.* at 373. If that purpose "cannot otherwise be accomplished – if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect – the state law must yield to the regulation of Congress within the sphere of its delegated power." *Savage v. Jones*, 225 U.S. 501, 533 (1912) (citations omitted). That there is "[t]ension between federal and state law is not enough to establish conflict preemption." *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1010 (9th Cir. 2007) (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984)). Accordingly, the Court finds conflict preemption only in "those situations where conflicts will necessarily arise." *Goldstein v. California*, 412 U.S. 546, 554 (1973).

Anchoring the Court's analysis, and of particular relevance when the preemption question concerns a state statute, is the presumption against preemption, which applies regardless of whether the Court is considering express, field, or conflict preemption. *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-55 (1995). As the Court has held repeatedly, "because the States

are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law." *Medtronic*, 518 U.S. at 485. Accordingly, "[i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (internal quotation marks and citations omitted); *see generally* THE FEDERALIST, No. 32, 198 (A. Hamilton) (1788) (Mentor ed. 1961). This presumption is "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic,* 518 U.S. at 485; *see also Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 715-16 (1985) (analyzing presumption).

Licensing is an exercise of a State's traditional police power. *See, e.g., Cleveland v. United States*, 531 U.S. 12, 21 (2000) ("[T]he statute . . . licenses, subject to certain conditions, engagement in pursuits that private actors may not undertake without official authorization. In this regard, it resembles other licensing schemes long characterized by this Court as exercises of state police powers.") (citing cases); *Braxee v. Michigan*, 241 U.S. 340, 343 (1916). Here, of course, the TAA is, in significant part, a licensing regime. Moreover, at the center of this controversy is Ferrer's allegation that the Contract is void because, among other reasons, Preston was not a licensed talent agent. The TAA prescribes a comprehensive scheme for regulating relations between artists and those

who procure employment for them. *See Styne*, 26 Cal. 4th at 58 (noting the TAA's purpose and breadth of administrative regulation "to protect artists from unscrupulous and unqualified talent agencies"). Moreover, California plainly enacted the TAA pursuant to its substantive police and regulatory power:

> The Act [the predecessor to the TAA] is a remedial statute. Statutes such as the Act are designed to correct abuses that have long been recognized and which have been the subject of both legislative action and judicial decision. Such statutes are enacted for the protection of those seeking employment. They properly fall within the police power of the state and their constitutionality has been repeatedly affirmed.

Buchwald v. Superior Court, 62 Cal. Rptr. 364, 367 (Cal. App. Ct. 1967) (citations omitted); *see Styne*, 26 Cal. 4th at 50, 58. Accordingly, in arguing that the FAA preempts this regulatory regime, Preston "bear[s] the considerable burden of overcoming 'the starting presumption that Congress does not intend to supplant state law.'" *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (internal quotation marks and citations omitted).

1. Under general preemption principles, there is no conflict between the TAA and the FAA.

As the Court has often held, "[t]he purpose of Congress is the ultimate touchstone in every preemption case." *Medtronic*, 518 U.S. at 485 (internal quotation marks and citation omitted). Critically, there is no evidence, indication, or even implication

that, in enacting the FAA, Congress intended to preempt state law regimes such as the TAA that, at most, merely postpone arbitration.

As noted, the purpose of the FAA was "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Volt*, 489 U.S. at 478 (internal quotation marks and citations omitted). As also noted, however, enforcement of the TAA in this case would not represent a departure from this purpose. Whether a contract within the purview of the TAA contains an arbitration clause or not, the Commissioner has original jurisdiction to determine whether the TAA has been violated, subject to *de novo* resolution by either (i) a court if there is no valid or applicable arbitration agreement between the parties, or (ii) an arbitrator if there is. It is thus fully possible to comply with both the TAA and the FAA, and the TAA presents no genuine obstacle to the ultimate resolution of a controversy through arbitration if the parties have, in fact, agreed to arbitrate.

In enacting the FAA, Congress intended to ensure that private arbitration agreements are enforced "in accordance with their terms." *Volt*, 489 U.S. at 478 (quoting *Prima Paint*, 388 U.S. at 404 n.12) ("the Act was designed 'to make arbitration agreements as enforceable as other contracts, but not more so'"). To that end, the Court has counseled that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Here, however, there are no doubts.

The question in this case is not whether any particular issue is or is not arbitrable. Nor is it whether an arbitration agreement may be enforced. Rather, the relevant question is temporal – *i.e.*, when the pertinent issues may be arbitrated. The purposes of the FAA simply are not frustrated by the administrative review that the TAA prescribes.

Critically, the TAA incorporates significant administrative investigatory functions into the Commissioner's review. Section 1700.44 of the TAA provides for an initial hearing before the Commissioner. CAL. LAB. CODE § 1700.44(a). A predicate to that hearing is an investigation. For example, the statute states that "[t]he Labor Commissioner may certify without a hearing that there is no controversy within the meaning of this section if he or she has *by investigation* established that there is no dispute" under the statute. *Id.* (emphasis supplied). This investigative feature of the TAA is obviously distinct from the role of either a court or an arbitrator. So is the Commissioner's ability to take administrative action following her investigation and hearing, including the adjustment of talent agency agreements and the pursuit of any enforcement proceedings.

Further, the *de novo* resolution feature of the TAA is purposefully designed to preserve the adjudicatory roles of a court or arbitrator. As the California Supreme Court has explained, following the Commissioner's determination, the post-administrative *de novo* proceeding before the Superior Court would be "a complete new trial . . . that is in no way a review of the prior proceeding" before the Commissioner. *Buchwald v. Katz*, 8 Cal. 3d 493, 502 (1972). In

Buchwald, the court reached this conclusion following an exhaustive analysis of the TAA's legislative history. *Id.* at 501-02. There is no reason why the same would not apply to post-administrative proceedings before an arbitrator. Thus, proceedings under the TAA are not a compulsory substitute for proceedings before either a court or arbitrator. Under the TAA, the Commissioner's role is distinct, and the respective roles of a court or arbitrator are fully preserved by the Act's *de novo* feature.

At the same time that the TAA preserves ultimate adjudicatory review for a court or arbitrator, the TAA also affords any ultimate decision maker the benefit of the Commissioner's expertise. *See Styne*, 26 Cal. 4th at 58 ("[R]eferral to the Commissioner serves the intended purpose of the doctrine of exhaustion of administrative remedies – to reduce the burden on courts while benefiting from the expertise of an agency particularly familiar and experienced in the area. The Commissioner's expertise in applying the [TAA] is particularly significant in cases where, as here, the essence of the parties' dispute is whether services performed were by a talent agency."); *Waisbren v. Peppercorn Prods., Inc.*, 41 Cal. App. 4th 246, 255 (1995).

It is precisely this concern with expertise that drives the doctrine of exhaustion of administrative remedies, which applies expressly to the TAA. The California Supreme Court has held emphatically that "[t]he reference of disputes involving the [A]ct to the Commissioner is *mandatory*[, that] [d]isputes *must* be heard by the Commissioner, and [that] all remedies before the Commissioner *must* be exhausted be-

fore the parties can proceed to the superior court." *Styne*, 26 Cal. 4th at 54 (citations omitted);[8] *see also REO Broadcasting Consultants v. Martin*, 69 Cal. App. 4th 489, 495 (1999) (same); *Humes v. Margil Ventures, Inc.*, 174 Cal. App. 3d 486, 494 (1985) ("Not only was respondent permitted to petition the Labor Commissioner for determination as to the alleged violation of the talent agency licensing requirement, she was obligated by the doctrine of exhaustion of remedies to seek determination by the Labor Commissioner before taking any judicial action.").

The Court has long extolled the benefits of the doctrine of exhaustion of administrative remedies: (i) to avoid "frequent and deliberate flouting of administrative processes [that] could weaken the effectiveness of an agency by encouraging people to ignore its procedures," *McKart v. United States*, 395 U.S. 185, 195 (1969); *see also Woodford v. Ngo*, 126 S. Ct. 2378, 2385 (2006); (ii) to "prevent[] premature interference with agency processes, so that the agency may function efficiently," *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); and (iii) to "afford the parties and the courts the benefit of its experience and expertise," *id.* Moreover, requiring exhaustion of administrative remedies may have the salutary effect of promoting settlement or some other quick and economical resolution. *Woodford*, 126 S. Ct. at 2385 ("[E]xhaustion promotes efficiency. Claims generally

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[8] *Styne* did not involve an arbitration provision in the parties' contract, which explains the reference "proceed to the superior court."

can be resolved much more quickly and economically in proceedings before an agency than in litigation in . . . court. In some cases, claims are settled at the administrative level, and in others, the proceedings before the agency convince the losing party not to pursue the matter in . . . court."); *McKart*, 395 U.S. at 195 ("A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene.").

In addition, requiring that the dispute be heard by the Commissioner in the first instance keeps the Commissioner abreast of potentially illegal activity and serves the prophylactic purpose of imparting to potential transgressors that the Commissioner is actively monitoring their activities. All of these considerations weigh in favor of initial review by the Commissioner, as contemplated by the TAA.

As a final point, the TAA is decidedly not anti-arbitration. As noted, section 1700.45 of the TAA permits parties to bypass the Commissioner's review in favor of proceeding straight to arbitration if they include in their arbitration clause provision for reasonable notice to the Commissioner of the "time and place of all arbitration hearings" and the right for her to attend these hearings. CAL. LAB. CODE § 1700.45. The plain intent of section 1700.45 is to accommodate arbitration as fully as possible while still permitting the Commissioner to exercise her oversight function consistent with the overall structure of the TAA. In this case, it is undisputed that Preston was an unlicensed talent agent, and that the Contract that he drafted did not meet the requirements of section

1700.45. Accordingly, section 1700.45 does not apply and the parties may proceed with arbitration only after the Commissioner conducts her review.

Based on the foregoing, a finding of preemption is not warranted in this case. Under the circumstances, the parties may readily comply with both state law (TAA) and federal law (FAA), *see, e.g., Florida Lime*, 373 U.S. at 142-43; the TAA does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the FAA, *see Crosby*, 530 U.S. at 372-73; and thus, no conflict exists that would warrant preemption. This is particularly so in light of the presumption against preemption that attaches to cases in which Congress has "legislated . . . in a field which the States have traditionally occupied," and "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485 (internal quotation marks and citations omitted).

2. Ousting the administrative procedure prescribed by the TAA would contravene the Court's preemption precedents concerning agency regulation in the FAA context.

Even if the arbitration-postponing aspects of the TAA are found to have some impact on arbitration in tension with the FAA, it defies credulity to suggest that, in enacting the FAA, Congress intended categorically to oust administrative agency action simply because two parties enter into an arbitration clause.

If so, parties could suspend an agency's exercise of its regulatory police authority simply by agreeing to arbitrate disputes otherwise within the agency's jurisdiction. No such conclusion is warranted, and review of the Court's precedents concerning the interplay between the FAA and agency action demonstrates that the FAA does not preempt the Commissioner's role under the TAA. *See WaffleHouse*, 534 U.S. at 288; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991).

In *WaffleHouse*, the Court held that the existence of an arbitration agreement between two parties would not bar the EEOC, as a non-party to that agreement, from pursuing victim-specific judicial relief on behalf of the employee. 534 U.S. at 288. In *WaffleHouse*, Eric Baker suffered a seizure, was discharged by his employer, WaffleHouse, and filed a charge of discrimination with the EEOC, alleging that his discharge violated the federal Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* 534 U.S. at 282-83. The EEOC filed an enforcement action in the district court, to which Baker was not a party. *Id.* at 283. WaffleHouse filed a petition under the FAA to stay the EEOC's suit and compel arbitration or dismiss the suit. *Id.* at 284. In concluding that the parties' arbitration clause posed no barrier to the EEOC's action, the Court discussed at some length the EEOC's "independent statutory responsibility to investigate and conciliate claims," concluding that neither statutory language nor case law "suggest[s] that the existence of an arbitration agreement between private parties materially changes the *EEOC's statutory function or the reme-*

dies that are otherwise available." *Id.* at 288 (emphasis supplied).

This conclusion is all the more warranted where, as here, the mission of the agency is predicated on the protection of the public. As discussed, the "clear object" of the TAA is "to prevent improper persons from becoming [talent agents] and to *regulate such activity for the protection of the public.*" *Waisbren*, 41 Cal. App. 4th at 261 (emphasis supplied). The Labor Commissioner, like the EEOC, "depends on the filing of charges to notify" her of violations of the statute entrusted to her. *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987). When an agency acts on this information, "albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest." *General Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980). For this reason, courts have held that "an employer and an employee cannot agree to deny the EEOC the information it needs to advance th[e] public interest," and that "[a] waiver of the right to file a charge is void as against public policy." *Cosmair*, 821 F.2d at 1090.

The Court's analysis in *Gilmer* reinforces its holding in *WaffleHouse*. In *Gilmer*, Robert Gilmer filed an age discrimination charge against his employer with the EEOC, and then subsequently brought suit in the district court under the federal Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621, *et seq.* 500 U.S. at 23-24. His employer filed a motion to compel arbitration on the basis of an arbitration clause in his employment agreement, which the district court denied. *Id.* The Fourth Circuit reversed, and this Court affirmed. *Id.*

Although the Court held that Gilmer and his employer were obligated to arbitrate their dispute as between themselves, the Court also stated that it was "unpersuaded by the argument that arbitration will undermine the role of the EEOC in enforcing the ADEA" because "[a]n individual ADEA claimant subject to an arbitration agreement *will still be free to file a charge with the EEOC*, even though the claimant is not able to institute a private judicial action." *Id.* at 28 (emphasis supplied). This reasoning applies to the circumstances presented here: The proceedings before the Commissioner, analogous to those before the EEOC in *Gilmer*, may still proceed provided that arbitration is the final destination of the controversy as between the parties. And, like the EEOC in *Gilmer*, the Commissioner has independent investigatory authority, *see* CAL. LAB. CODE § 1700.7, and may receive information concerning alleged violations of the TAA from any source. *See* 500 U.S. at 27. Indeed, as noted, the Commissioner's investigatory role is a predicate to the hearing contemplated in section 1700.44 of the TAA. CAL. LAB. CODE § 1700.44(a).[9]

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[9] Petitioner's reliance on *Gilmer* to support his theory of preemption is misplaced. *See* Pet. Br. at 12-14. In *Gilmer*, the claimant argued that the FAA did not prevent him from pursuing his discrimination claim in court under the theory that Congress intended all claims under the ADEA to be exempt from the FAA. The Court did not address the issues presented here except to state that the parties' obligation to arbitrate did not prevent the employee from filing a charge with the EEOC.

Recognition of and respect for the roles of administrative agencies is particularly relevant in preemption determinations concerning agencies vested with authority by state statutes pertaining to health and public safety in light of the presumption against preemption, which is at its zenith in these contexts. *Medtronic*, 518 U.S. at 485; *Hillsborough*, 471 U.S. at 715-16. Given the absence of any conflict that would give rise to preemption in this case, and the presence of an administrative agency charged by a state statute with protecting the public's welfare and exercising the State's traditional police power of licensing in order to fulfill its charge, Preston has failed to shoulder his "considerable burden of overcoming the starting presumption that Congress does not intend to supplant state law." *De Buono*, 520 U.S. at 814 (internal quotation marks and citation omitted).

C. Alternatively, The Court Should, If Necessary, Limit *Southland* To Affirm The Decision Below, Or Overrule *Southland* And Hold That The FAA Does Not Apply To Preempt State Statutes That Exempt Certain State Law Controversies From Arbitration.

For the reasons discussed above, the Court should affirm the decision below either (i) because the parties agreed to be bound by California law and, under *Volt*, a state procedural rule that, at most, postpones arbitration is not preempted by the FAA, or (ii) because, under the Court's general preemption precedents and, specifically, *WaffleHouse*, the FAA does not preempt agency review of the kind at issue

under the TAA. In the event the Court rejects these arguments, the Court should nonetheless affirm because the FAA (i) applies only in federal court as a remedial procedural device and does not apply in state court; (ii) does not abrogate substantive state law limitations on arbitration agreements governed by state law, even though these limitations preclude arbitration in certain classes of state law controversies; or, at the very least, (iii) does not abrogate procedural state law limitations on arbitration agreements governed by state law that merely regulate or postpone arbitration. To the extent they hold otherwise, the Court should limit or overrule *Southland* and its progeny.

1. *Southland* and its progeny have created problems in the lower courts and should be limited.

In *Allied-Bruce*, the Court declined the invitation of the respondents and their State *amici* to overrule *Southland*, noting, among other things, that "no unforeseen practical problems ha[d] arisen" in the years since *Southland* was decided. 513 U.S. at 272. Serious problems, however, have arisen, as evidenced by the lower courts' interpretations of *Southland* and its progeny as requiring them to overturn a host of state statutory regimes intended to vindicate important state interests.

For example, in *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719 (4th Cir. 1990), the Fourth Circuit held that section 2 of the FAA preempted a section of the Virginia Motor Vehicle Dealer Licensing Act prohibiting non-negotiable arbitration clauses in franchise

agreements between automobile manufacturers and dealers. 905 F.2d at 722. Relying on *Southland* and *Perry*, the Fourth Circuit stated: "The argument that the Virginia statute is a necessary part of the state's scheme to protect dealers must . . . fail." *Id.* at 727. [10] A dissenting judge stated that "the majority abandons the proper and appropriate preemption analysis and fails to take account of Virginia's inherent right to protect her own citizens." *Id.* at 727 (Widener, J., dissenting). This erosion of essential state substantive policies and protections in the wake of *Southland* warrants further consideration, particularly with respect to comprehensive statutes, such as the TAA, enacted to protect a State's citizens from abuse.

If, under *Southland* and its progeny, the FAA is deemed to preempt the Commissioner's role under the TAA in this case, this result would constitute an extraordinary erosion of a State's ability to craft comprehensive regulatory regimes designed to pro-

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[10] *See also, e.g., Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898 (5th Cir. 2005) (FAA preempts Louisiana law prohibiting employers' use of forum selection and choice of law clauses in employment contracts), *cert. denied*, 546 U.S. 826 (2005); *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443 (5th Cir. 2001) (FAA preempts Louisiana statute invalidating as against public policy construction contracts requiring suits or arbitrations arising therefrom to be brought outside the state); *Miller v. Public Storage Mgmt., Inc.*, 121 F.3d 215 (5th Cir. 1997) (FAA preempts Texas employment retaliation law that disfavors arbitration for such claims); *Commerce Park at DFW Freeport v. Mardian Constr. Co.*, 729 F.2d 334 (5th Cir. 1984) (FAA preempts Texas Deceptive Trade Practices Act provisions requiring judicial resolution of claims brought thereunder).

tect its citizens from abusive conduct. It would also cut deeply into the fabric of state law in a manner far removed from the principles articulated in *Southland* and in the Court's subsequent decisions applying it. Accordingly, if *Southland* and its progeny are the basis for overturning section 1700.44 of the TAA in this case, *Southland* and its progeny should be limited to preserve the role of the Commissioner under the Act.

Unlike the Alabama statute at issue in *Allied-Bruce*, the TAA does not render arbitration agreements wholly unenforceable; on the contrary, it explicitly permits arbitration in lieu of review by the Commissioner under section 1700.44. CAL. LAB. CODE § 1700.45. [11] Nor does the TAA limit the availability of arbitration as an alternative to a judicial forum for the resolution of disputes; on the contrary, through its *de novo* feature, the TAA preserves this path. *Contrast Allied-Bruce*, 513 U.S. at 273; *Perry*, 482 U.S. at 490-91; *Southland*, 465 U.S. at 10-11. And far from exemplifying "state legislative attempts to undercut the enforceability of arbitration agreements" that concerned the Court in *Southland*, *see* 465 U.S. at 16, the TAA merely ensures that the Commissioner is informed of, and involved as appro-

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[11] Under this provision, arbitration is permitted subject only to limited procedural requirements that, if not complied with, merely postpone rather than defeat arbitration. CAL. LAB. CODE § 1700.45. In other words, even if the parties fail to comply with the requirements of section 1700.45, they may still arbitrate, but must wait until after the Commissioner's review to do so.

priate in, matters arbitrated under a statute that she is charged with enforcing.

A critical distinction exists between legislation that a State enacts simply to foreclose arbitrations *in toto* and statutes like the TAA that preserve the right to arbitrate while also preserving the jurisdiction of an administrative forum in furtherance of important public policies. The latter type of legislation seeks to address concerns unique to the State's polity, providing substantive protections and benefits deemed appropriate by the particular State's legislature. The State's independent judgment in this regard should be afforded considerable latitude. *See, e.g., Southland*, 465 U.S. at 19 (Stevens, J., concurring in part, dissenting in part) ("The existence of a federal statute enunciating a substantive federal policy *does not necessarily require* the inexorable application of a uniform federal rule of decision notwithstanding the differing conditions which may exist in the several States and regardless of the decisions of the States to exert police powers as they deem best for the welfare of their citizens.") (emphasis supplied); *Perry*, 482 U.S. at 494 (Stevens, J., dissenting) ("the States' power to except certain categories of disputes from arbitration should be preserved unless Congress decides otherwise").

Broad application of *Southland* to overrule California's statutory regime in this case would imperil other State statutes that require private parties to submit their disputes to an administrative panel. In so doing, the Court would severely limit state efforts to craft prelitigation administrative reviews, either to streamline dispute resolution and promote settle-

ment, or to enable an administrative body to enhance its expertise and ability to take regulatory action by observing an entire class of disputes.

For example, several States require parties who wish to challenge the adequacy of a physician's care to submit their claims to "mandatory prelitigation screening and mediation panels." ME. REV. STAT. ANN. tit. 24 § 2851; *see also* ALASKA STAT. § 09.55.536; IDAHO CODE Ann. § 6-1001; MASS. GEN. LAWS ch. 231, § 60B; MICH. COMP. LAWS § 600.4903; MONT. CODE ANN. § 27-6-701; NEB. REV. STAT. § 44-2840; N.M. STAT. § 41-5-14; WASH. REV. CODE ANN. § 7.70.100; WYO. STAT. ANN. § 9-2-1518.

Congress did not pass the FAA to prohibit States from crafting more efficient methods to resolve claims through the use of panels of experts. Nor did Congress, in enacting the FAA, indicate any desire to deprive States of the ability to use case-screening panels to build administrative expertise over specialized areas of the law. If the Court holds, however, that the FAA preempts the TAA in this case, it will effectively bar state efforts to capture and screen all cases of a certain type, regardless of the State's motive, where the parties have executed an arbitration agreement. For example, by the simple expedient of executing an arbitration clause, parties could defeat a State's effort to have an administrative panel review in advance all claims for medical malpractice before proceeding either to litigation or arbitration.

As the Court's precedents demonstrate generally, the need to respect a State's independent judgment is especially acute in cases involving statutes that were

enacted pursuant to a State's substantive police powers. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (courts should exercise caution and be "absolutely certain" that Congress intended to displace substantive state law before it allows for the preemption). This principle ought to apply in full in the Court's consideration of the TAA, which California plainly enacted as a remedial, substantive body of regulation. *Styne*, 26 Cal. 4th at 50. To the extent the Court determines that *Southland* and its progeny establish a bright-line preemption standard barring administrative review prior to arbitration, the Court should reconsider *Southland* and adopt instead an approach that balances the interests of the State and the purposes of the FAA. Where, as here, the state law does not prohibit arbitration but merely postpones it in favor of a state administrative process that serves important state interests, the Court should conclude that the State's procedures do not run afoul of the FAA. The State's independent judgment in the exercise of its police powers should be preserved, especially where, as here, it is possible to do so without sacrificing the essential purposes of the FAA.

In the final analysis, the problems underlying the Court's decision in *Southland* (and Congress's enactment of the FAA) simply do not arise in this case. Given that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules," *Volt*, 489 U.S. at 476, and the TAA's narrow "remedial" purpose of "protect[ing] artists seeking professional employment from the abuses of talent agencies," *Styne*, 26 Cal. 4th at 50, the Commissioner's review

of this dispute in the first instance does no violence to any federal policy favoring arbitration. In contrast, applying the FAA to preempt the role of the Commissioner would do significant violence to the unique California policy embodied in the TAA. And given that the FAA has "no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration," *Volt*, 489 U.S. at 477, there is room enough under the FAA for the State interests at stake in this case to be "recognized without impairing the basic purposes of the federal statute," *Southland*, 465 U.S. at 864 (Stevens, J., concurring in part, dissenting in part). To the extent that *Southland* and its progeny compel a different conclusion, they should be limited.

2. If necessary, the Court should overrule *Southland* and its progeny as contrary to the text, history, purpose, and logic of the FAA.

Much has been written about *Southland*, with several Justices and nearly all commentators opining that it is inconsistent with Congress's intent and wrongly decided. Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 129 (2006); *see* IAN R. MACNEIL, AMERICAN ARBITRATION LAW 83-133 (1992); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and*

the Federal Arbitration Act, 67 LAW & CONTEMP. PROBS. 5, 8-54 (2004).[12]

As has been noted repeatedly, the FAA's legislative history demonstrates that "[t]he primary purpose of the statute is to make enforcible [sic] in the Federal courts . . . agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts." Joint Hearings (statement of Julius Cohen); *id.* at 37 (stating that "[t]he statute as drawn establishes a procedure in the Federal courts for the enforcement of arbitration agreements" and "is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws"); *id.* at 39-40 ("Nor can it be said that the Congress of the United States, *directing its own courts*. . . would infringe upon the provinces or prerogatives of the States. . . . [T]he question of the enforcement relates to the law of remedies and not to substantive law.") (emphasis supplied); H.R. Rep. No. 68-96, at 1 (1924); *Committee on Commerce, Trade and Commercial Law, The United States Arbitration Law and its Application*, 11 A.B.A. J. 153, 154-55 (1925) ("ABA Report") ("That the enforcement of arbitration contracts is within the law of procedure as distinguished

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[12] It should be noted that, in litigating *Southland*, the state court private plaintiffs who appeared as appellees had stipulated in the lower courts that the FAA applies in state court. *See* Br. of Appellees in No. 82-500 (filed June 6, 1983) at 25 n.30. Accordingly, the Court in *Southland* apparently lacked the full benefit of adversarial briefing.

from substantive law is well settled by decisions of our courts."); *Southland*, 465 U.S. at 25 (O'Connor, J., dissenting) ("One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts . . . .").

Notably, the proposed legislation faced a "complete lack of opposition," which is unsurprising given that all understood it to be limited to the federal courts. MACNEIL, *supra*, at 115. The FAA "would have been viewed in 1925 as a massive interference with state law had it been intended to apply in state courts." *Id.*; *see Allied-Bruce*, 513 U.S. at 287-88 (Thomas, J., dissenting) (noting that at the time of the FAA's enactment, federal legislation mandating procedures applicable in state courts "would have been extraordinary"). Shortly after the FAA's enactment, the American Bar Association Committee that had drafted and supported the legislation wrote:

> The statute establishes a procedure in the Federal courts for the enforcement of arbitration agreements. . . . A Federal statute providing for the enforcement of arbitration agreements does relate solely to procedure in the Federal courts. . . . [W]hether or not an arbitration agreement is to be enforced is a question of the law of procedure . . . That the enforcement of arbitration contracts is within the law of procedure as distinguished from substantive law is well settled by the decisions of our courts.

ABA Report at 154-55; *see also* Julius Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 275-76 (1926).

Interpreting the FAA as applicable to state courts, or as invalidating state law substantive and procedural limitations on arbitration in state law controversies, is also contrary to the text of the statute. Although section 2 of the FAA provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, sections 3 and 4 identify the courts in which the FAA's requirements apply and set forth procedures concerning the statute's enforcement, 9 U.S.C. §§ 3, 4. The express application of sections 3 and 4 to "courts of the United States" or "any United States district court" demonstrates Congress's intent to limit the FAA's application to federal courts. *See Southland,* 465 U.S. at 29 (O'Connor, J., dissenting) ("The structure of the FAA itself runs directly contrary to the reading the Court today gives to § 2. §§ 3 and 4 are the implementing provisions of the Act, and they expressly apply only to federal courts."); *Allied-Bruce,* 513 U.S. at 291 (Thomas, J., dissenting) ("[T]he text of the statute nonetheless makes clear that § 2 was not meant as a statement of substantive law binding on the States . . . [and] the ensuing provisions of the Act . . . clearly rest on the assumption that federal courts have jurisdiction to enforce arbitration agreements only when they would have had jurisdiction over the underlying dispute.") (citing 9 U.S.C. §§ 3, 4, 8).

That the FAA is procedural and not substantive is demonstrated further by the fact that section 2 "does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise." *Southland*, 465 U.S. at 15 n.9; *see Allied-Bruce*, 513 U.S. at 291 (Thomas, J., dissenting) (explaining that the "*reason* that § 2 does not give rise to federal-question jurisdiction is that it was enacted as purely a procedural provision"). Indeed, "the FAA is the only federal 'substantive' statute in which there is no federal subject matter jurisdiction." Moses, *supra*, at 131.

The broad reach of the FAA as applied in *Southland* and its progeny is not based upon congressional intent but on judicially created federal common law. *See Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 132 (2001) (Stevens, J., dissenting) ("There is little doubt that the Court's interpretations of the Act has given it a scope far beyond the expectations of the Congress that enacted it."). Under the circumstances, *stare decisis* should not stand as a bar to limiting or overruling *Southland*. *See Allied-Bruce*, 513 U.S. at 284-85 (Scalia, J., dissenting) ("*Southland* clearly misconstrued the Federal Arbitration Act. . . and entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes. Abandoning it does not impair reliance interests to a degree that justifies this evil."); *id.* at 295 (Thomas, J., dissenting) ("[T]he doctrine [of *stare decisis*] is insufficient to save *Southland*.").

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

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STATUTORY ADDENDUM

9 U.S.C.A. § 2

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

* * * * *

CAL. CODE CIV. PROC. § 1281.2 (2007)

§ 1281.2. Order to arbitrate; Determination of other issues

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) Grounds exist for the revocation of the agreement.

(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground

that the petitioner's contentions lack substantive merit.

If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies.

If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.

CAL. LABOR CODE § 1700.4 (2007)

§ 1700.4. "Talent agency" and "artists" defined

(a) "Talent agency" means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.

(b) "Artists" means actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises.

CAL. LABOR CODE § 1700.5 (2007)

§ 1700.5. Necessity of talent agency license; posting an advertisement; renewal of prior licenses

No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner. The license shall be posted in a conspicuous place in the office of the licensee. The license number shall be referred to in any advertisement for the purpose of the solicitation of talent for the talent agency.

* * * * *

CAL. LABOR CODE § 1700.23 (2007)

§ 1700.23. Approval of talent agency contracts; grounds for disapproval; required statements in contracts

Every talent agency shall submit to the Labor Commissioner a form or forms of contract to be utilized by such talent agency in entering into written contracts with artists for the employment of the services of such talent agency by such artists, and secure the approval of the Labor Commissioner thereof. Such approval shall not be withheld as to any proposed form of contract unless such proposed form of contract is unfair, unjust and oppressive to the artist. Each such form of contract, except under the conditions specified in Section 1700.45, shall contain an agreement by the talent agency to refer any controversy between the artist and the talent agency relating to the terms of the contract to the Labor Commissioner for adjustment. There shall be printed on the face of the contract in prominent type the following: "This talent agency is licensed by the Labor Commissioner of the State of California."

CAL. LABOR CODE § 1700.24 (2007)

§ 1700.24. Filing and posting of talent agency fee schedule; changes in schedule

Every talent agency shall file with the Labor Commissioner a schedule of fees to be charged and collected in the conduct of that occupation, and shall also keep a copy of the schedule posted in a conspicuous place in the office of the talent agency. Changes in the schedule may be made from time to time, but no fee or change of fee shall become effective until seven days after the date of filing thereof with the Labor Commissioner and until posted for not less than seven days in a conspicuous place in the office of the talent agency.

CAL. LABOR CODE § 1700.44 (2007)

§ 1700.44. Dispute; hearing; determination; bond; certification of no controversy; failure to obtain license; limitations of actions

(a) In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo.

* * * * *

The Labor Commissioner may certify without a hearing that there is no controversy within the meaning of this section if he or she has by investigation established that there is no dispute as to the amount of the fee due. Service of the certification shall be made upon all parties concerned by registered or certified mail with return receipt requested and the certification shall become conclusive 10 days after the date of mailing if no objection has been filed with the Labor Commissioner during that period.

* * * * *

CAL. LABOR CODE § 1700.45 (2007)

§ 1700.45. Arbitration; contract provisions

Notwithstanding Section 1700.44, a provision in a contract providing for the decision by arbitration of any controversy under the contract or as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination, shall be valid:

(a) If the provision is contained in a contract between a talent agency and a person for whom the talent agency under the contract undertakes to endeavor to secure employment, or

(b) If the provision is inserted in the contract pursuant to any rule, regulation, or contract of a bona fide labor union regulating the relations of its members to a talent agency, and

(c) If the contract provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings, and

(d) If the contract provides that the Labor Commissioner or his or her authorized representative has the right to attend all arbitration hearings.

Except as otherwise provided in this section, any arbitration shall be governed by the provisions of Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure.

* * * * *

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IN THE

Supreme Court of the United States

ARNOLD M. PRESTON,

Petitioner,

v.

ALEX E. FERRER,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA

RESPONDENT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

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RESPONDENT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Rules 25.5 and 25.6 of the Rules of this Court, Respondent Alex E. Ferrer ("Ferrer") respectfully requests leave to file the attached supplemental brief addressing and including a copy of *Marathon Entertainment, Inc. v. Blasi*, a recent decision of the California Supreme Court issued on January 28, 2008. The *Marathon* decision is relevant because it reinforces several points made in Ferrer's brief, and is responsive to certain inquiries that the Court made at oral argument regarding, among other things, the scope and purpose of the California Talent Agencies Act, the role of the California Labor Commissioner in interpreting the Act, and the importance of the Labor Commissioner's interpretations in establishing a comprehensive body of law surrounding the Act.

Ferrer filed his brief in this case on December 3, 2007. The Court conducted oral argument on January 14, 2008. Because the California Supreme Court did not issue the *Marathon* decision until January 28, 2008, the decision was not available at the time Ferrer filed his brief or prior to oral argument. Because the decision addresses issues of state law relevant to this matter, Ferrer respectfully requests that

the Court grant leave to file the attached supplemental brief.

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Dated: February 1, 2008

SUPPLEMENTAL BRIEF FOR RESPONDENT

On January 28, 2008, the California Supreme Court issued its opinion in *Marathon Entertainment, Inc. v. Blasi*. Supp. App. ("SA") 1a. In the *Marathon* case, the court construed the California Talent Agencies Act ("TAA" or "Act") in a manner that reinforces several points made in Ferrer's brief, and that is also responsive to certain inquiries that the Court made at oral argument regarding, among other things, the scope and purpose of the TAA, the role of the California Labor Commissioner in interpreting the Act, and the importance of the Labor Commissioner's interpretations in establishing a comprehensive body of law surrounding the Act

Among its several conclusions, the court rejected the argument that "personal managers are categorically exempt from regulation under the Act." SA 12a. Instead, the court determined that "contrary to the arguments of personal manager Marathon Entertainment, Inc. (Marathon), the strictures of the Talent Agencies Act . . . apply to managers as well as agents." SA 2a-3a. The court explained that the "Act establishes its scope through a functional, not a titular, definition. It regulates *conduct*, not labels; it is the act of procuring (or soliciting), not the title of one's business, that qualifies one as a talent agency and subjects one to the Act's licensure and related requirements." SA 13a (emphasis in original). It follows that "[a]ny person who procures employment -- any individual, any corporation, any manager -- is a talent agency subject to regulation." SA 13a. In

sum, "a personal manager who solicits or procures employment for his artist-client is subject to and must abide by the Act." SA 13a.

In addition to discussing the scope of the TAA, the California Supreme Court addressed its history and purpose, noting that "[f]rom an early time, the Legislature was concerned that those representing aspiring artists might take advantage of them." SA 9a. The court added that the "[e]xploitation of artists by representatives has remained the Act's central concern through subsequent incarnations to the present day." SA 9a-10a.

Addressing the Labor Commissioner's role in administering the TAA, the California Supreme Court recognized the importance of the Commissioner's ongoing interpretation of the Act's provisions and her development of a coherent body of law surrounding the Act through her consideration of individual disputes. *See* SA 15a-16a (noting that "the Labor Commissioner has uniformly interpreted the Act as extending to incidental procurement") (citing Labor Commissioner's decisions); *id.* at 20a (stating that "the Labor Commissioner has struggled over time to better delineate which actions involve mere general assistance to an artist's career and which stray across the line to illicit procurement."). Recognizing the Commissioner's expertise, the court observed that the Commissioner's precedential interpretations of the TAA "are entitled to substantial weight if not clearly erroneous." SA 16a; *see also id.* at 13a-14a (noting that the court may look to the La-

bor Commissioner's interpretations of the TAA for guidance).

At the same time, the California Supreme Court recognized the non-binding nature of the Labor Commissioner's determinations in any particular matter. Specifically, the court stated that "under the Act's statutorily guaranteed trial de novo procedure, the Labor Commissioner's findings carry no weight." SA 21a. Thus, although the Labor Commissioner is charged *generally* with developing a body of law interpreting the TAA (and could not do so as the Act is structured if she has no disputes to resolve), any litigant in any *particular* case is entitled to complete *de novo* consideration following the Commissioner's determination in any particular case.

Respectfully submitted,

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APPENDIX

APPENDIX — DECISION OF THE SUPREME COURT OF CALIFORNIA FILED JANUARY 28, 2008

IN THE SUPREME COURT OF CALIFORNIA

S145428

Ct.App. 2/1 B179819

Los Angeles County
Super. Ct. No. BC230839

MARATHON ENTERTAINMENT, INC.,

Plaintiff and Appellant,

v.

ROSA BLASI et al.,

Defendants and Respondents.

In Hollywood, talent-the actors, directors, and writers, the Jimmy Stewarts, Frank Capras, and Billy Wilders who enrich our daily cultural lives-is represented by two groups of people: agents and managers. Agents procure roles; they put artists on the screen, on the stage, behind the camera; indeed, by law, only they may do so. Managers coordinate everything else; they counsel and advise, take care of business arrangements, and chart the course of an artist's career.

This division largely exists only in theory. The reality is not nearly so neat. The line dividing the functions of agents, who must be licensed, and of managers, who need not be, is often blurred and sometimes crossed. Agents sometimes counsel and advise; managers sometimes procure work. Indeed, the occasional procurement of employment opportunities may be standard operating procedure for many managers and an understood goal when not-yet-established talents, lacking access to the few licensed agents in Hollywood, hire managers to promote their careers.[1]

We must decide what legal consequences befall a manager who steps across the line and solicits or procures employment without a talent agency license. We hold that (1) contrary to the arguments of personal manager Marathon Entertainment, Inc. (Marathon), the strictures of the Talent Agencies Act (Lab.Code, § 1700

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1. See Zelenski, *Talent Agents, Personal Managers, and Their Conflicts in the New Hollywood* (2003) 76 So.Cal. L.Rev. 979, 993-998 (hereafter *Conflicts in the New Hollywood*); Comment, *The Talent Agencies Act: Reconciling the Controversies Surrounding Lawyers, Managers, and Agents Participating in California's Entertainment Industry* (2001) 28 Pepperdine L.Rev. 381, 386 (hereafter *Talent Agencies Act*); Comment, *Regulation of Attorneys Using California's Talent Agencies Act: A Tautological Approach to Protecting Artists* (1992) 80 Cal. L.Rev. 471, 481-484 (hereafter *Regulation of Attorneys*). Additionally, in connection with the petition for review in this case, this court has received dozens of letters from personal managers working in the entertainment industry who suggest they owe a fiduciary duty to their clients to procure employment.

et seq.) (Act) apply to managers as well as agents; (2) contrary to the arguments of actress Rosa Blasi (Blasi), while the Labor Commissioner has the authority to void manager-talent contracts *ab initio* for unlawful procurement, she also has discretion to apply the doctrine of severability to partially enforce these contracts; and (3) in this case, a genuine dispute of material fact exists over whether severability might apply to allow partial enforcement of the parties' contract. Accordingly, we affirm the Court of Appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In 1998, Marathon and Blasi entered into an oral contract for Marathon to serve as Blasi's personal manager. Marathon was to counsel Blasi and promote her career; in exchange, Blasi was to pay Marathon 15 percent of her earnings from entertainment employment obtained during the course of the contract. During the ensuing three years, Blasi's professional appearances included a role in a film, Noriega: God's Favorite (Industry Entertainment 2000), and a lead role as Dr. Luisa Delgado on the television series *Strong Medicine.*

According to Marathon, Blasi reneged on her agreement to pay Marathon its 15 percent commission from her *Strong Medicine* employment contract. In the summer of 2001, she unilaterally reduced payments to 10 percent. Later that year, she ceased payment altogether and terminated her Marathon contract, stating that her licensed talent agent, John Kelly, who

had served as her agent throughout the term of the management contract with Marathon, was going to become her new personal manager.

Marathon sued Blasi for breach of oral contract, quantum meruit, false promise, and unfair business practices, seeking to recover unpaid *Strong Medicine* commissions. Marathon alleged that it had provided Blasi with lawful personal manager services by providing the downpayment on her home, paying the salary of her business manager, providing her with professional and personal advice, and paying her travel expenses.

After obtaining a stay of the action, Blasi filed a petition with the Labor Commissioner alleging that Marathon had violated the Act by soliciting and procuring employment for Blasi without a talent agency license.[2] The Labor Commissioner agreed, finding that Marathon had violated the Act by providing talent agency services without a license, including "procur[ing] work for [Blasi] as an actress on the . . . television series, *Strong Medicine.*" It voided the parties' contract *ab initio* and barred Marathon from recovery.

Marathon appealed the Labor Commissioner's ruling to the superior court for a trial de novo. (See § 1700.44, subd. (a); *Buchwald v. Katz* (1972)

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2. The Labor Commissioner has original and exclusive jurisdiction over issues arising under the Act. (*Styne v. Stevens* (2001) 26 Cal.4th 42, 54-56, 109 Cal.Rptr.2d 14, 26 P.3d 343;Lab.Code, § 1700.44, subd. (a).) All further undesignated statutory references are to the Labor Code.

8 Cal.3d 493, 500-501, 105 Cal.Rptr. 368, 503 P.2d 1376.) It also amended its complaint to include declaratory relief claims challenging the constitutionality of the Act. Marathon alleged that the Act's enforcement mechanisms, including the sanction of invalidating the contracts of personal managers that solicit or procure employment for artists without a talent agency license, violated the managers' rights under the due process, equal protection, and free speech guarantees of the state and federal Constitutions.

Blasi moved for summary judgment on the theory that Marathon's licensing violation had invalidated the entire personal management contract. Blasi submitted excerpts from the Labor Commissioner hearing transcript as evidence that Marathon had violated the Act by soliciting or procuring employment for her without a talent agency license. Blasi did not specifically argue or produce evidence that Marathon had illegally procured the *Strong Medicine* employment contract.

The trial court granted Blasi's motion for summary judgment and invalidated Marathon's personal management contract as an illegal contract for unlicensed talent agency services in violation of the Act, denied Marathon's motion for summary adjudication of the Act's constitutionality, and entered judgment for Blasi.

The Court of Appeal reversed in part. It agreed with the trial court that the Act applied to personal managers. However, it concluded that under the law of severability

of contracts (Civ. Code, § 1599), because the parties' agreement had the lawful purpose of providing personal management services that are unregulated by the Act, and because Blasi had not established that her *Strong Medicine* employment contract was procured illegally, the possibility existed that Blasi's obligation to pay Marathon a commission on that contract could be severed from any unlawful parts of the parties' management agreement. In reaching this conclusion, the Court of Appeal distinguished prior cases that had voided management contracts in their entirety (*Yoo v. Robi* (2005) 126 Cal.App.4th 1089, 24 Cal.Rptr.3d 740; *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 48 Cal.Rptr.2d 437) and in some cases expressly refused to sever the contracts (*Yoo*, at pp. 1104-1105, 24 Cal.Rptr.3d 740).

We granted review to address the applicability of the Act to personal managers and the availability of severance under the Act.

Discussion

I. *Background*

A. *Agents and Managers*

In Hollywood, talent agents act as intermediaries between the buyers and sellers of talent. (*Regulation of Attorneys, supra,* 80 Cal. L.Rev. at p. 479.) While formally artists are agents' clients, in practice a talent agent's livelihood depends on cultivating valuable

connections on both sides of the artistic labor market. (Birdthistle, *A Contested Ascendancy: Problems with Personal Managers Acting as Producers* (2000) 20 Loyola L.A. Ent. L .J. 493, 502-503 (hereafter *Contested Ascendancy*); *Regulation of Attorneys, at* p. 479.) Generally speaking, an agent's focus is on the deal: on negotiating numerous short-term, project-specific engagements between buyers and sellers. (Conflicts *in the New Hollywood, supra,* 76 So.Cal. L.Rev. at p. 981.)

Agents are effectively subject to regulation by the various guilds that cover most of the talent available in the industry: most notably, the Screen Actors Guild, American Federation of Television and Radio Artists, Directors Guild of America, Writers Guild of America, and American Federation of Musicians. (*Regulation of Attorneys, supra,* 80 Cal. L.Rev. at p. 487.) Artists may informally agree to use only agents who have been "franchised" by their respective guilds; in turn, as a condition of franchising, the guilds may require agents to agree to a code of conduct and restrictions on terms included in agent-talent contracts. (*Conflicts in the New Hollywood, supra,* 76 So.Cal. L.Rev. at pp. 989-990; *Contested Ascendancy, supra,* 20 Loyola L.A. Ent. L.J. at p. 520.) Most significantly, those restrictions typically include a cap on the commission charged (generally 10 percent), a cap on contract duration, and a bar on producing one's client's work and obtaining a producer's fee. (Screen Actors Guild, Codified Agency Regs., rule 16(g); American Federation of Television and Radio Artists, Regs. Governing Agents, rule 12-C; *Matthau v. Superior Court* (2007) 151 Cal.App.4th 593, 596-597, 60

Cal.Rptr.3d 93; *Conflicts in the New Hollywood,* at pp. 989-990, 60 Cal.Rptr.3d 93; *Contested Ascendancy, at* pp. 520-521, 60 Cal.Rptr.3d 93.) These restrictions create incentives to establish a high volume clientele, offer more limited services, and focus on those lower risk artists with established track records who can more readily be marketed to talent buyers. (*Conflicts in the New Hollywood,* at p. 981,60 Cal.Rptr.3d 93; *Contested Ascendancy,* at p. 503, 60 Cal.Rptr.3d 93.)

Personal managers, in contrast, are not franchised by the guilds.(*Conflicts in the New Hollywood, supra,* 76 So.Cal. L.Rev. at p. 991; *Contested Ascendancy, supra,* 20 Loyola L.A. Ent. L.J. at p. 522.) They typically accept a higher risk clientele and offer a much broader range of services, focusing on advising and counseling each artist with an eye to making the artist as marketable and attractive to talent buyers as possible, as well as managing the artist's personal and professional life in a way that allows the artist to focus on creative productivity. (*Waisbren v. Peppercorn Productions, Inc., supra,* 41 Cal.App.4th at pp. 252-253, 48 Cal.Rptr.2d 437; Cal. Entertainment Com., Rep. (Dec. 2, 1985) p. 9 (hereafter Entertainment Commission Report); *Regulation of Attorneys, supra,* 80 Cal. L.Rev. at pp. 482-483.) "Personal managers primarily advise, counsel, direct, and coordinate the development of the artist's career. They advise in both business and personal matters, frequently lend money to young artists, and serve as spokespersons for the artists." (*Park v. Deftones* (1999) 71 Cal.App.4th 1465, 1469-1470, 84 Cal.Rptr.2d 616.) Given this greater degree of involvement and risk,

managers typically have a smaller client base and charge higher commissions than agents (as they may, in the absence of guild price caps); managers may also produce their clients' work and thus receive compensation in that fashion. (*Conflicts in the New Hollywood,* at p. 992,84 Cal.Rptr.2d 616; Talent *Agencies Act, supra,* 28 Pepperdine L.Rev. at p. 383; *Contested Ascendancy,* at pp. 508, 526-527; *Regulation of Attorneys,* at p. 483.)

B. *The Talent Agencies Act*

Aside from guild regulation, the representation of artists is principally governed by the Act. (§§ 1700-1700.47.) The Act's roots extend back to 1913, when the Legislature passed the Private Employment Agencies Law and imposed the first licensing requirements for employment agents. (*Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347, 357, 62 Cal.Rptr. 364; *Talent Agencies Act, supra,* 28 Pepperdine L .Rev. at p. 387; *Regulation of Attorneys, supra,* 80 Cal. L.Rev. at p. 493.) From an early time, the Legislature was concerned that those representing aspiring artists might take advantage of them, whether by concealing conflicts of interest when agents split fees with the venues where they booked their clients, or by sending clients to houses of ill-repute under the guise of providing "employment opportunities." (See Stats.1913, ch. 282, § 14, pp. 519-520 [prohibiting agents from fee-splitting, sending artists to "house[s] of ill fame" or saloons, or allowing "persons of bad character" to frequent their establishments]; *Talent Agencies Act,* at pp. 386-387; *Regulation of Attorneys,* at p. 493.) Exploitation of artists by representatives has remained

the Act's central concern through subsequent incarnations to the present day. (See *Styne v. Stevens, supra,* 26 Cal.4th at p. 50, 109 Cal.Rptr.2d 14, 26 P.3d 343.)

In 1978, the Legislature considered establishing a separate licensing scheme for personal managers. (See Assem. Bill No. 2535 (1977-1978 Reg. Sess.) as amended May 1, 1978, § 41; Assem. Com. on Labor, Employment & Consumer Affairs, Analysis of Assem. Bill No. 2535 (1977-1978 Reg. Sess.) as amended May 1, 1978, pp. 1-4; Entertainment Com. Rep., *supra,* at p. 8.) Unable to reach agreement, the Legislature eventually abandoned separate licensing of personal managers and settled for minor changes in the statutory regime, shifting regulation of musician booking agents to the Labor Commissioner and renaming the Artists' Managers Act the Talent Agencies Act. (Stats.1978, ch. 1382, pp. 4575-4583.)

In 1982, the Legislature provisionally amended the Act to impose a one-year statute of limitations, eliminate criminal sanctions for violations of the Act, and establish a "safe harbor" for managers to procure employment if they did so in conjunction with a licensed agent. (Former § 1700.44, as enacted by Stats.1982, ch. 682, § 3, p. 2815; Entertainment Com. Rep., *supra,* at pp. 8, 38-39.) It subjected these changes to a sunset provision and established the 10-person California Entertainment Commission (Entertainment Commission), consisting of agents, managers, artists, and the Labor Commissioner, to evaluate the Act and "recommend to the Legislature

a model bill." (Former §§ 1701-1704, added by Stats.1982, ch. 682, § 6, p. 2816, repealed by its own terms, Jan. 1, 1986.) In 1986, after receiving the Entertainment Commission Report, the Legislature adopted its recommendations, which included making the 1982 changes permanent and enacting a modest series of other changes. (Stats.1986, ch. 488, pp. 1804-1808; Entertainment Com. Rep., at pp. 22-34; Sen. Com. on Industrial Relations, Analysis of Assem. Bill No. 3649 (1985-1986 Reg. Sess.) as amended Apr. 15, 1986, p. 5 [bill would implement Entertainment Commission's recommendations "in full"].) So the Act has stood, with minor modifications, for the last 20 years.

In its present incarnation, the Act requires anyone who solicits or procures artistic employment or engagements for artists[3] to obtain a talent agency license. (§§ 1700.4, 1700.5.) In turn, the Act establishes detailed requirements for how licensed talent agencies conduct their business, including a code of conduct, submission of contracts and fee schedules to the state, maintenance of a client trust account, posting of a bond, and prohibitions against discrimination, kickbacks, and

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3. " 'Artists' means actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises."(§ 1700.4, subd. (b).)

certain conflicts of interest. (§§ 1700.23-1700.47.) No separate analogous licensing or regulatory scheme extends to personal managers. (*Waisbren v. Peppercorn Productions, Inc., supra,* 41 Cal.App.4th at p. 252, 48 Cal.Rptr.2d 437.)

With this background in mind, we turn to two questions not previously addressed by this court: whether the Act in fact applies to personal managers, as the Courts of Appeal and Labor Commissioner have long assumed, and if so, how.

II. *The Scope of the Talent Agencies Act: Application to Managers*

Marathon contends that personal managers are categorically exempt from regulation under the Act. We disagree; as we shall explain, the text of the Act and persuasive interpretations of it by the Courts of Appeal and the Labor Commissioner demonstrate otherwise.

We begin with the language of the Act. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 927, 22 Cal.Rptr.3d 530, 102 P.3d 915.) Section 1700.5 provides in relevant part: "No *person* shall engage in or carry on the occupation of a *talent agency* without first procuring a license therefor from the Labor Commissioner." (Italics added.) In turn, "person" is expressly defined to include "any individual, company, society, firm, partnership, association, corporation, limited liability company, *manager,* or their agents or employees" (§ 1700, italics added), and " '[t]alent agency' means a person or

corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists" other than recording contracts (§ 1700.4, subd. (a)).

The Act establishes its scope through a functional, not a titular, definition. It regulates *conduct*, not labels; it is the act of procuring (or soliciting), not the title of one's business, that qualifies one as a talent agency and subjects one to the Act's licensure and related requirements. (§ 1700.4, subd. (a).) Any person who procures employment-any individual, any corporation, any manager-is a talent agency subject to regulation. (§§ 1700, 1700.4, subd. (a).) Consequently, as the Courts of Appeal have unanimously held, a personal manager who solicits or procures employment for his artist-client is subject to and must abide by the Act. (*Park v. Deftones, supra*, 71 Cal.App.4th at pp. 1470-1471, 84 Cal.Rptr.2d 616; *Waisbren v. Peppercorn Productions, Inc., supra*, 41 Cal.App.4th at p. 253, 48 Cal.Rptr.2d 437; see also *Buchwald v. Superior Court, supra*, 254 Cal.App.2d at pp. 354-355, 62 Cal.Rptr. 364 [deciding same issue under the Act's predecessor, the Artists' Managers Act].)[4] The

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4. The Legislature clearly agreed with this understanding of the Act. In 1978, it considered but ultimately rejected a special exemption that would have specifically authorized personal managers to procure employment for artists already represented by licensed talent agencies. (See Assem. Bill No. 2535 (1977-1978 Reg. Sess.) as amended May 10, 1978 [deleting proposal to enact new § 1708, which would have codified special exemption].) In 1986, it made permanent section 1700.44, subdivision (d), (Cont'd)

Labor Commissioner, whose interpretations of the Act we may look to for guidance (see *Styne v. Stevens, supra*, 26 Cal.4th at p. 53, 109 Cal.Rptr.2d 14, 26 P.3d 343; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8, 78 Cal.Rptr.2d 1, 960 P.2d 1031), has similarly uniformly applied the Act to personal managers. (See, e.g., *Sheridan v. Yoches, Inc.* (Cal.Lab.Com., Sept. 4, 2007) TAC No. 21-06, pp. 2, 13-20; *Jones v. La Roda Group* (Cal.Lab.Com., Dec. 30, 2005) TAC No. 35-04, pp. 9-11; *Hall v. X Management, Inc.* (Cal.Lab.Com., Apr. 24, 1992) TAC No. 19-90, pp. 28-35.)[5]

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which creates a safe harbor for an unlicensed person or entity to "act in conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment contract."Both the originally contemplated exemption and the ultimately adopted safe harbor provision would have been largely superfluous if unlicensed entities were already free to procure employment, so long as they did not label themselves as talent agencies. (See *Waisbren v. Peppercorn Productions, Inc., supra*, 41 Cal.App.4th at p. 259, 48 Cal.Rptr.2d 437.)

5. While we do not place great weight on legislative inaction, we note as well that the Legislature in 1982 considered but ultimately rejected an amendment to the Act that would have expressly exempted a particular class of personal managers-an amendment that would have been wholly superfluous if, as Marathon argues, they were already exempt. (Compare Assem. Bill No. 997 (1981-1982 Reg. Sess.) as amended Aug. 17, 1982 [including exemption] with Assem. Bill No. 997 (1981-1982 Reg. Sess.) as amended Aug. 26, 1982 [deleting exemption].)

As to the further question whether even a single act of procurement suffices to bring a manager under the Act, we note that the Act references the "occupation" of procuring employment and serving as a talent agency. (§ § 1700.4, subd. (a), 1700.5.) Considering this in isolation, one might interpret the statute as applying only to those who regularly, and not merely occasionally, procure employment. (See *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 628, 16 Cal.Rptr.2d 496 [Act applies only when "the agent's employment procurement function constitutes a significant part of the agent's business as a whole"].) However, as we have previously acknowledged in dicta, "[t]he weight of authority is that even the incidental or occasional provision of such services requires licensure." (*Styne v. Stevens, supra,* 26 Cal.4th at p. 51, 109 Cal.Rptr.2d 14, 26 P.3d 343, citing *Park v. Deftones, supra,* 71 Cal.App.4th 1465, 84 Cal.Rptr.2d 616, and *Waisbren v. Peppercorn Productions, Inc., supra,* 41 Cal.App.4th 246, 48 Cal.Rptr.2d 437.)[6] In agreement with these decisions, the Labor Commissioner has uniformly interpreted the Act as extending to incidental procurement. (See, e .g.,

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6. Post-*Styne,* the Courts of Appeal have arrived at unanimity on this question. In *Yoo v. Robi, supra,* 126 Cal.App.4th 1089, 24 Cal.Rptr.3d 740, the same court that had issued *Wachs v. Curry, supra,* 13 Cal.App.4th 616, 16 Cal.Rptr.2d 496, effectively repudiated its prior interpretation, noting with approval that courts have "unanimously denied ... recovery to personal managers even when the majority of the managers' activities did not require a talent agency license and the activities which did require a license were minimal and incidental."(*Yoo,* at p. 1104, 24 Cal.Rptr.3d 740, fn. omitted.)

Gittelman v. Karolat (Cal.Lab.Com., July 19, 2004) TAC No. 24-02, p. 14; *Kilcher v. Vainshtein* (Cal.Lab.Com., May 30, 2001) TAC No. 02-99, pp. 20-21; *Damon v. Emler* (Cal.Lab.Com., Jan. 12, 1982) TAC No. 36-79, p. 4.) The Labor Commissioner's views are entitled to substantial weight if not clearly erroneous (*Styne v. Stevens*, at p. 53, 109 Cal.Rptr.2d 14, 26 P.3d 343); accordingly, we likewise conclude the Act extends to individual incidents of procurement.

Marathon offers two main arguments against the conclusion that it is subject to the Act whenever it solicits or procures employment. First, it objects that the Act's title and contents reference only talent agencies and thus only talent agencies may be regulated under the Act. (See Cal. Const., art. IV, § 9; *Brunson v. City of Santa Monica* (1915) 27 Cal.App. 89, 92-93, 148 P. 950 [act whose title limits its scope to public *officer* liability may not constitutionally be interpreted to alter public *municipal corporation* liability].) Article IV, section 9 sets out this state's single-subject rule and, as relevant here, requires: "A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not in its title, only the part not expressed is void." From this, Marathon reasons that (1) the Act's title omits reference to regulation of personal managers, and (2) to the extent it purports to regulate personal managers, it is thus void.

This is a misreading of the constitutional provision and the 1978 legislation. The single-subject rule is intended to prevent "log-rolling by the Legislature, i.e.,

combining several proposals in a single bill so that legislators, by combining their votes, obtain a majority for a measure which would not have been approved if divided into separate bills." (*Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1096, 240 Cal.Rptr. 569, 742 P.2d 1290.) In turn, "the requirement that the single subject of a bill shall be expressed in its title is to prevent misleading or inaccurate titles so that legislators and the public are afforded reasonable notice of the contents of a statute." (*Ibid.*; see also *Homan v. Gomez* (1995) 37 Cal.App.4th 597, 600, 43 Cal.Rptr.2d 647 [rule intended to prevent unrelated provisions from sliding through "unnoticed and unchallenged"]; *Planned Parenthood Affiliates v. Swoap* (1985) 173 Cal.App.3d 1187, 1196, 219 Cal.Rptr. 664 [rule intended to " 'prevent legislators and the public from being entrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under the title of another' "].)

However, the single-subject rule "is to be liberally construed to uphold proper legislation and not used to invalidate legitimate legislation." (*San Joaquin Helicopters v. Department of Forestry* (2003) 110 Cal.App.4th 1549, 1556, 3 Cal.Rptr.3d 246; accord, *Harbor v. Deukmejian, supra,* 43 Cal.3d at pp. 1097-1098, 240 Cal.Rptr. 569, 742 P.2d 1290; *Metropolitan Water Dist. v. Marquardt* (1963) 59 Cal.2d 159, 172-173, 28 Cal.Rptr. 724, 379 P.2d 28; *Evans v. Superior Court* (1932) 215 Cal. 58, 62, 8 P.2d 467.) The Legislature may combine in a single act numerous provisions " 'governing projects so related and interdependent as to constitute a single scheme,' " and provisions auxiliary to the

scheme's execution may be adopted as part of that single package. (*Harbor,* at p. 1097, 240 Cal.Rptr. 569, 742 P.2d 1290, quoting *Evans,* at p. 62, 8 P.2d 467.) The act's title "need not contain either an index or an abstract of its provisions. The constitutional mandate [citation] is satisfied if the provisions themselves are cognate and germane to the subject matter designated by the title, and if the title intelligently refers the reader to the subject to which the act applies, and suggests the field of legislation which the text includes." (*Powers Farms, Inc. v. Consolidated Irr. Dist.* (1941) 19 Cal.2d 123, 130, 119 P.2d 717; see also *City of Whittier v. Dixon* (1944) 24 Cal.2d 664, 666, 151 P.2d 5 [to satisfy the Constitution, title need only "contain[ ] a reasonably intelligible reference to the subject to which the legislation is addressed"]; *Lyons v. Municipal Court* (1977) 75 Cal.App.3d 829, 841, 142 Cal.Rptr. 449.)

Here, the 1978 legislation and its title satisfy the California Constitution. The legislation's provisions pertain to a single subject, the comprehensive regulation of persons and entities that provide talent agency services. The title, quoted in full in the margin, identifies that subject and specifically references the existing comprehensive regulations that are to be modified.[7] The

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7. The title of the legislation is: "An act to amend Section 9914 of, to repeal Section 9902.8 of, and to repeal Chapter 21.5 (commencing with Section 9999) of Division 3 of, the Business and Professions Code, and to amend the heading of Chapter 4 (commencing with Section 1700) of Part 6 of Division 2 of, to amend Sections 1700.2, 1700.3, 1700.4, 1700.5, 1700.6, 1700.7, (Cont'd)

legislation defines talent agencies as those that engage in particular conduct; thus, to the extent personal managers engage in that conduct, they fit within the legislation's title and subject matter and may be regulated by its provisions.

Second, Marathon correctly notes that in 1978, after much deliberation, the Legislature decided not to add separate licensing and regulation of personal managers to the legislation. (See Assem. Bill No. 2535 (1977-1978 Reg. Sess.) as amended May 10, 1978, pp. 16-18 [deleting new licensure provisions].) The consequence of this conscious omission is not, as Marathon contends, that personal managers are therefore exempt from regulation. Rather, they remain exempt from regulation insofar as they do those things that personal managers do, but they are regulated under the Act to the extent they stray into doing the things that make one a talent agency under the Act.[8]

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1700.9, 1700.11, 1700.12, 1700.13, 1700.15, 1700.16, 1700.17, 1700.19, 1700.20a, 1700.20b, 1700.23, 1700.24, 1700.25, 1700.26, 1700.27, 1700.28, 1700.30, 1700.31, 1700.32, 1700.33, 1700.34, 1700.35, 1700.36, 1700.37, 1700.38, 1700.39, 1700.40, 1700.41, 1700.43, and 1700.45 of, to add Section 1700.47 of, and to repeal and add Section 1700.10 of, the Labor Code, *relating to talent agencies.*" (Stats.1978, ch. 1382, p. 4575, italics added.)

8. The Entertainment Commission articulated precisely this rationale in concluding there was no need to separately license personal managers: "It is not a person who is being licensed

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Appendix

III. *Sanctions for Solicitation and Procurement Under the Act*

A. *Marathon's Procurement*

We note we are not called on to decide, and do not decide, what precisely constitutes "procurement" under the Act. The Act contains no definition, and the Labor Commissioner has struggled over time to better delineate which actions involve mere general assistance to an artist's career and which stray across the line to illicit procurement. Here, however, the Labor Commissioner concluded Marathon had engaged in various instances of procurement, the trial court concluded there was no material dispute that Marathon had done so, and Marathon has not further challenged that conclusion. We thus take it as a given that Marathon has engaged in one or more acts of procurement and that (as the parties also agree) Marathon has no talent agency license to do so.

We also take as a given, at least at this stage, that Marathon's unlicensed procurement did not include the procurement specifically of Blasi's *Strong Medicine* role.

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[under] the [Act;] rather, it is the activity of procuring employment. Whoever performs that activity is legally defined as a talent agent and [must be] licensed, as such. Therefore, the licensing of a personal manager-or anyone else who undertakes to procure employment for an artist-with the [Act] already in place would be a needless duplication of licensure activity."(Entertainment Com. Rep., *supra*, at pp. 20-21.)

Blasi takes issue with this point, correctly pointing out that the Labor Commissioner found to the contrary, but (1) under the Act's statutorily guaranteed trial de novo procedure, the Labor Commissioner's findings carry no weight (*Buchwald v. Katz, supra*, 8 Cal.3d at p. 501, 105 Cal.Rptr. 368, 503 P.2d 1376), and (2) neither Blasi's separate statement of undisputed material facts nor the evidence supporting it establish that Marathon procured the *Strong Medicine* role. Thus, for present purposes we presume Marathon did not procure that role for Blasi.

Finally, although Marathon argued below that it fell within section 1700.44, subdivision (d)'s "safe harbor" for procurement done in conjunction with a licensed talent agency, it has not preserved that argument here. Accordingly, we assume for present purposes that the safe harbor provision does not apply.

B. *The Applicability of the Doctrine of Severability to Manager-talent Contracts*

We turn to the key question in Blasi's appeal: What is the artist's remedy for a violation of the Act? In particular, when a manager has engaged in unlawful procurement, is the manager always barred from any recovery of outstanding fees from the artist or may the court or Labor Commissioner apply the doctrine of severability (Civ.Code, § 1599) to allow partial recovery of fees owed for legally provided services?

Again, we begin with the language of the Act. On this question, it offers no assistance. The Act is silent — completely silent — on the subject of the proper remedy for illegal procurement.

On the other hand, the text of Civil Code section 1599 is clear. Adopted in 1872, it codifies the common law doctrine of severability of contracts: "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." (*Ibid.*) By its terms, it applies even-indeed, only — when the parties have contracted, in part, for something illegal. Notwithstanding any such illegality, it preserves and enforces any lawful portion of a parties' contract that feasibly may be severed.[9]

Under ordinary rules of interpretation, we must read Civil Code section 1599 and the Act so as to, to the extent possible, give effect to both. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 15, fn. 11, 50 Cal.Rptr.3d 585, 145 P.3d 462; *People v. Garcia* (1999) 21 Cal.4th 1, 6, 87 Cal.Rptr.2d 114, 980 P.2d 829.) The two are not in conflict. The Act defines conduct, and hence contractual arrangements, that are illegal: An unlicensed talent agency may not contract with talent to provide procurement services. (Lab.Code, § § 1700.4, subd. (a),

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9. Civil Code section 1598 codifies the companion principle for when severability is infeasible: "Where a contract has but a single object, and such object is unlawful, whether in whole or in part . . . , the entire contract is void."

1700.5.) The Act provides no remedy for its violation, but neither does it repudiate the generally applicable and long-standing rule of severability. Hence, that rule applies absent other persuasive evidence that the Legislature intended to reject the rule in disputes under the Act.

The conclusion that the rule applies is consistent with those of the Labor Commissioner's decisions that recognize severability principles may apply to disputes under the Act. In *Almendarez v. Unico Talent Management, Inc.* (Cal.Lab.Com., Aug. 26, 1999) TAC No. 55-97, a radio personality sought a determination that his personal manager had acted as an unlicensed talent agency. The Labor Commissioner concluded the manager had engaged in unlawful procurement — indeed, that procuring employment was the manager's primary role (*id.* at pp. 2, 14, 87 Cal.Rptr.2d 114, 980 P.2d 829) — but stopped short of voiding all agreements between the parties in their entirety. Citing and applying Civil Code section 1599, the Labor Commissioner concluded that a 1997 agreement between the parties had both a lawful purpose (repayment of personal expenses the manager had fronted for Almendarez) and an unlawful purpose (payment of commissions for unlawful procurement services) and should be partially enforced. (*Almendarez*,at pp. 18-21, 87 Cal.Rptr.2d 114, 980 P.2d 829.) On numerous other occasions, the Labor Commissioner has severed contracts and allowed

managers to retain or seek commissions based on severability principles without expressly citing Civil Code section 1599.[10]

Until two years ago, Court of Appeal decisions under the Act had neither accepted nor repudiated the general

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10. See, e.g., *Danielewski v. Agon Investment Co.* (Cal.Lab.Com ., Oct. 28, 2005) TAC No. 41-03, pages 24-27 (partially enforcing agreement to the extent it involved loan repayment and invalidating it to the extent it involved payment of commissions for unlawful services); *Gittelman v. Karolat, supra*, TAC No. 24-02 pages 14-16 (where manager engaged in unlawful procurement before 1997 but not thereafter, holding agreement unenforceable through 1997, but allowing manager to seek commissions earned thereafter); *Cuomo v. Atlas/Third Rail Management, Inc.* (Cal.Lab.Com., Jan. 3, 2003) TAC No. 21-01, pages 13-14 (voiding contract only for the period of time after manager commenced acting as an unlicensed talent agency and denying disgorgement of commissions for earlier lawful services); *Anderson v. D'Avola* (Cal.Lab.Com., Feb. 24, 1995) TAC No. 63-93, pages 11-12 (where manager acted as an unlicensed talent agency in procuring role, denying right to recover commissions for that role, but preserving right to recover commissions for personal manager services in connection with later role lawfully procured by Anderson's licensed talent agency); *Bank of America Nat. Trust & Sav. Assn. v. Fleming* (Cal.Lab.Com., Jan. 14, 1982) No. 1098 ASC MP-432, page 16 (ordering return of 20 percent of compensation based on a determination respondent spent 20 percent of time acting as an unlicensed talent agency). More recent Labor Commissioner decisions appear to take a more stringent view toward the availability of severance. We address these decisions *post* at page 24.

applicability of the severability doctrine.[11] In 2005, in *Yoo v. Robi, supra*, 126 Cal.App.4th 1089, 24 Cal.Rptr.3d 740, however, the Court of Appeal considered whether to apply Civil Code section 1599 to allow a personal manager to seek commissions for lawfully provided services. It noted, correctly, that severance is not mandatory and its application in an individual case must be informed by equitable considerations. (*Yoo*, at p. 1105, 24 Cal.Rptr.3d 740.) Civil Code section 1599 grants courts the power, not the duty, to sever contracts in order to avoid an inequitable windfall or preserve a contractual relationship where doing so would not condone illegality. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 123-124, 99 Cal.Rptr.2d 745, 6 P.3d 669.) The *Yoo* Court of Appeal concluded the windfall for the artist, Robi, was not so great as to warrant severance.

In *Chiba v. Greenwald* (2007) 156 Cal.App.4th 71, 67 Cal.Rptr.3d 86, the Court of Appeal also considered whether severance was available for an unlicensed manager/agent who in that case alleged she had had a *Marvin* agreement[12] with her deceased musician client/

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11. The same is true of our own decisions. In *Styne v. Stevens, supra*, 26 Cal.4th at page 51, 109 Cal.Rptr.2d 14, 26 P.3d 343, we correctly noted in dicta that "an unlicensed person's contract with an artist to provide the services of a talent agency is illegal and void."We did not address whether severance could ever apply to contracts with artists to provide personal management services.

12. *Marvin v Marvin* (1976) 18 Cal.3d 660, 134 Cal.Rptr. 815, 557 P.2d 106.

partner. Acknowledging she had acted without a license, the manager relinquished any claim to commissions, and the Court of Appeal thus was not presented with the question whether severance might apply to any management services that required no license. In light of the facts as pleaded, the Court of Appeal concluded equity did not require severance of any lawful portions of the *Marvin* agreement from the unlawful agreement to provide unlicensed talent agency services. (*Chiba*, at pp. 81-82, 67 Cal.Rptr.3d 86.)

Neither *Chiba* nor *Yoo v. Robi*, *supra*, 126 Cal.App.4th 1089, 24 Cal.Rptr.3d 740, stands for the proposition that severance is never available under the Act. In contrast, the Court of Appeal here expressly concluded, as we do, that it is available.

More generally, the conclusion that severance is available is consistent with a wide range of cases that have applied the doctrine to partially enforce contracts involving unlicensed services. Thus, for example, in *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 70 Cal.Rptr.2d 304, 949 P.2d 1 (*Birbrower*), a law firm licensed in New York, but not California, provided legal services in both states. The trial court and Court of Appeal invalidated the entire attorney fee agreement, but we reversed in part, explaining that under the doctrine of severability the firm might be able to recover the fees it had lawfully earned by providing services in New York, notwithstanding its unlicensed provision of services in California. (*Id.* at pp. 138-139, 70 Cal.Rptr.2d 304, 949

P.2d 1.)[13] Likewise, in *Lindenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 64 Cal.Rptr.2d 484, an individual assisted a company in finding home health care businesses to acquire. The individual may have acted only as a finder with regard to some businesses, but may have crossed the line into providing broker services without a real estate broker license in other instances. The Court of Appeal explained that the provision of unlicensed services did not bar all relief; on remand, the unlicensed individual could still recover for those services that did not require a broker's license. (*Id.* at p. 894, 64 Cal.Rptr.2d 484; see also *Levinson v. Boas* (1907) 150 Cal. 185, 194, 88 P. 825 [severance doctrine applies to contract with unlicensed pawnbroker]; *Broffman v. Newman* (1989) 213 Cal.App.3d 252, 261-262, 261 Cal.Rptr. 532 [unlicensed real estate broker may defend entitlement to compensation for services for which no license is

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13. Blasi distinguishes *Birbrower* on the ground that there the basis for differentiating services for which recovery could be had from those for which it could not was jurisdictional. This is a distinction without a difference. We recognized in *Birbrower* a point equally applicable here: In the absence of an express contrary legislative determination, the equitable principles of severability may be applied to contracts where some portion of the services provided was unlicensed and hence unlawful. (*Birbrower, supra,* 17 Cal.4th at pp. 138-139, 70 Cal.Rptr.2d 304, 949 P.2d 1; cf. *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 151, 308 P.2d 713 [Bus. & Prof.Code, § 7031"represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties" and forecloses severance of those contracts to which it applies].)

required]; *Southfield v. Barrett* (1970) 13 Cal.App.3d 290, 294, 91 Cal.Rptr. 514 [under equitable principles, unlicensed commission merchant entitled to partial recovery under contract].)

Blasi contends that even if severability may generally apply to disputes under the Act, we should announce a rule categorically precluding its use to recover for artist advice and counseling services. She relies on three sources in support of this rule: the legislative history, case law interpreting the Act, and decisions of the Labor Commissioner. None persuades us that the Legislature intended to foreclose the application of severability, as codified in Civil Code sections 1598 and 1599, to manager-talent contracts that involve illegal procurement, either generally or with regard to recovery specifically for personal manager services.

For legislative history, Blasi relies on a portion of the Entertainment Commission's 1985 report to the Legislature. Addressing whether criminal sanctions for violations of the Act, temporarily suspended in 1982, should be reinstated, the Entertainment Commission said: "The majority of the Commission believes that existing civil remedies, which are available by legal action in the civil courts, to anyone who has been injured by breach of the Act, are sufficient to serve the purposes of deterring violations of the Act and punishing breaches. These remedies include actions for breach of contract, fraud and misrepresentation, breach of fiduciary duty, interference with business opportunity, defamation,

infliction of emotional distress, and the like. *Perhaps the most effective weapon for assuring compliance with the Act is the power of the Labor Commissioner, at a hearing on a Petition to Determine Controversy, to find that a personal manager or anyone has acted as an unlicensed talent agent and, having so found, declare any contract entered into between the parties void from the inception and order the restitution to the artist, for the period of the statute of limitations, of all fees paid by the artist and the forfeiture of all expenses advanced to the artist. If no fees have been paid, the Labor Commissioner is empowered to declare that no fees are due and owing, regardless of the services which the unlicensed talent agent may have performed on behalf of the artist.* [¶] These civil and administrative remedies for violation of the Act continue to be available and should serve adequately to assure compliance with the Act." (Entertainment Com. Rep., *supra*, at pp. 17-18.) According to Blasi, this passage demonstrates the Entertainment Commission endorsed voiding of contracts in all instances, and the Legislature necessarily embraced this view because it adopted all of the commission's proposals when it amended the Act in 1986.

We are not persuaded. The passage acknowledges what all parties recognize — that the Labor Commissioner has the "power" to void contracts, that she is "empowered" to deny all recovery for services where the Act has been violated, and that these remedies are "available." But the *power* to so rule does not suggest a *duty* to do so in all instances. The Labor Commissioner is empowered to void contracts in their entirety, but

nothing in the Entertainment Commission's description of the available remedies suggests she is obligated to do so, or that the Labor Commissioner's power is untempered by the ability to apply equitable doctrines such as severance to achieve a more measured and appropriate remedy where the facts so warrant. Thus, we need not consider at length Blasi's further contention that these two paragraphs in the Entertainment Commission Report accurately reflect the views of the Legislature as a whole. Even if so, they do not connote an intent that managers in proceedings under the Act be deprived of the opportunity even to raise severability.

Second, Blasi relies on those Court of Appeal decisions that have voided manager-talent contracts in their entirety. (E.g., *Chiba v. Greenwald, supra,* 156 Cal.App.4th 71, 67 Cal.Rptr.3d 86; *Yoo v. Robi, supra,* 126 Cal.App.4th 1089, 24 Cal.Rptr.3d 740; *Park v. Deftones, supra,* 71 Cal.App.4th 1465, 84 Cal.Rptr.2d 616; *Waisbren v. Peppercorn Productions, Inc., supra,* 41 Cal.App.4th 246, 48 Cal.Rptr.2d 437.) With the exception of *Chiba* and *Yoo,* discussed above, however, the decisions do not touch on when or whether the doctrine of severability should apply under the Act; as such, they offer no persuasive arguments in favor of reading the Act as precluding application of Civil Code section 1599.[14]

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14. For this same reason, we see no basis for concluding the Legislature has acquiesced in an interpretation of the Act under which severability is precluded. Until 2005, the issue had never been discussed in the Courts of Appeal.

Finally, Blasi relies on a long line of Labor Commissioner decisions that have denied personal managers any right to recover commissions where they engaged in unlicensed solicitation or procurement. (See, e.g., *Cher v. Sammeth* (Cal.Lab.Com., July 17, 2000) TAC No. 17-99, pp. 12-13; *Sevano v. Artistic Productions, Inc.* (Cal.Lab.Com., Mar. 20, 1997) TAC No. 8-93, pp. 23-25.) But the fact this remedy is often, or even *almost* always, appropriate, does not support the position that it is *always* proper. The Labor Commissioner decisions cited above (see *ante,* at pp. 17-18, 24 Cal.Rptr.3d 740) suggest the Labor Commissioner historically has recognized she has the authority to allow partial recovery in appropriate circumstances.

We recognize, however, that in more recent decisions, the Labor Commissioner has expressly adopted the position Blasi advocates: severance is never available to permit partial recovery of commissions for managerial services that required no talent agency license. (*Smith v. Harris* (Cal.Lab.Com., Aug. 27, 2007) TAC No. 53-05, pp. 16-17; *Cham v. Spencer/Cowings Entertainment, LLC* (Cal.Lab.Com., July 30, 2007) TAC No. 19-05, pp. 17-18.) The weight accorded agency adjudicatory rulings such as these varies according to the validity of their reasoning and their overall persuasive force. (*Yamaha Corp. of America v. State Bd. of Equalization, supra,* 19 Cal.4th at pp. 12-15, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) Here, the Labor Commissioner's views rest in part on a reading of the legislative history as suggesting such a rule, in part on a reading of past Court of Appeal decisions as announcing such a rule, and perhaps in part

on a policy judgment that voiding contracts in their entirety is necessary to enforce the Act effectively. With due respect, the Labor Commissioner's assessment of the legislative history and case law is mistaken; as we have explained, neither requires the rule she proposes. And any view that it would be better policy if the Act stripped the Labor Commissioner (and the superior courts in subsequent trials de novo) of the power to apply equitable doctrines such as severance would be squarely at odds with the Act's text, which contains no such limitation. Neither we nor the Labor Commissioner are authorized to engraft onto the Act such a limitation neither express nor implicit in its terms. We are thus unpersuaded and decline to follow the Labor Commissioner's interpretation.

In sum, the Legislature has not seen fit to specify the remedy for violations of the Act. Ordinary rules of interpretation suggest Civil Code section 1599 applies fully to disputes under the Act; nothing in the Act's text, its history, or the decisions interpreting it justifies the opposite conclusion. We conclude the full voiding of the parties' contract is available, but not mandatory; likewise, severance is available, but not mandatory.

C. *Application of the Severability Doctrine*

Finally, we turn to application of the severability doctrine to the facts of this case, insofar as those facts are established by the summary judgment record. Given the procedural posture, our inquiry is narrow: On this record, has Blasi established as a matter of law that there is no basis for severance?

In deciding whether severance is available, we have explained "[t]he overarching inquiry is whether ' "the interests of justice ... would be furthered" ' by severance." (*Armendariz v. Foundation Health Psychcare Services, Inc., supra*, 24 Cal.4th at p. 124, 99 Cal.Rptr.2d 745, 6 P.3d 669.) "Courts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." (*Ibid.*; accord, *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074, 130 Cal.Rptr.2d 892, 63 P.3d 979.)

Blasi does not contend that particular evidence in the record unique to this contract establishes severance cannot apply. Instead, she offers two arguments applicable to this contract and to manager-talent contracts in general.

First, Blasi points to the nature of the compensation. In the Marathon-Blasi contract, as with most such contracts, there is no match between services and compensation. That is, a personal manager provides an undifferentiated range of services; in exchange, he receives an undifferentiated right to a certain percentage of the client's income stream.

This compensation scheme is essentially analogous to a contingency fee arrangement, in which an attorney

provides an undifferentiated set of services and is compensated not for each service but as a percentage of the ultimate recovery her efforts yield for her client. In *Birbrower,* we dealt with both fixed fee and contingency fee arrangements, and nothing in the nature of the latter stood as an obstacle to application of severability. We directed the trial court to determine on remand, if it determined a partially valid agreement existed, what value should be attributed to legally provided services and what to illegally provided services. (*Birbrower, supra,* 17 Cal.4th at pp. 139-140, 70 Cal.Rptr.2d 304, 949 P.2d 1.) While an undifferentiated compensation scheme may in some instances preclude severance (see Civ.Code, § 1608; *Selten v. Hyon* (2007) 152 Cal.App.4th 463, 471, 60 Cal.Rptr.3d 896), *Birbrower* demonstrates that it does not represent a categorical obstacle to application of the doctrine.[15] Accordingly, we may not affirm summary judgment on this basis.

Second, Blasi argues that once a personal manager solicits or procures employment, all his services-advice, counseling, and the like-become those of an unlicensed talent agency and are thus uncompensable. We are not

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15. Other courts have likewise recognized that severability may apply, so long as the service provider contributes lawful consideration wholly independent of the illegal services, without regard to whether payment was allocated in advance between the lawful and unlawful services. (E.g., *Whorton v. Dillingham* (1988) 202 Cal.App.3d 447, 452-454, 248 Cal.Rptr. 405 [applying severance where the plaintiff alleged a *Marvin* agreement based on both sexual services and chauffeur, bodyguard, secretarial, and business services].)

persuaded. In this regard, the conduct-driven definitions of the Act cut both ways. A personal manager who spends 99 percent of his time engaged in counseling a client and organizing the client's affairs is not insulated from the Act's strictures if he spends 1 percent of his time procuring or soliciting; conversely, however, the 1 percent of the time he spends soliciting and procuring does not thereby render illegal the 99 percent of the time spent in conduct that requires no license and that may involve a level of personal service and attention far beyond what a talent agency might have time to provide. Courts are empowered under the severability doctrine to consider the central purposes of a contract; if they determine in a given instance that the parties intended for the representative to function as an unlicensed talent agency or that the representative engaged in substantial procurement activities that are inseparable from managerial services, they may void the entire contract. For the personal manager who truly acts as a personal manager, however, an isolated instance of procurement does not automatically bar recovery for services that could lawfully be provided without a license. (See *Lindenstadt v. Staff Builders, Inc., supra,* 55 Cal.App.4th at p. 894, 64 Cal.Rptr.2d 484.)

Inevitably, no verbal formulation can precisely capture the full contours of the range of cases in which severability properly should be applied, or rejected. The doctrine is equitable and fact specific, and its application is appropriately directed to the sound discretion of the Labor Commissioner and trial courts in the first instance. As the Legislature has not seen fit to preclude

categorically this case-by-case consideration of the doctrine in disputes under the Act, we may not do so either.

In closing, we note one final point apparent from the briefing and oral argument. Letters and briefs submitted by personal managers indicate a uniform dissatisfaction with the Act's application. At oral argument, counsel for Blasi likewise agreed that the Legislature might profitably consider revisiting the Act. The Legislature has in the past expressed dissatisfaction with the Act's enforcement scheme. (See Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1359 (1989-1990 Reg. Sess.) as amended May 1, 1989, p. 2 [decrying absence of effective regulatory and enforcement mechanisms in the wake of the Entertainment Commission's inability to devise an "equitable civil or criminal penalty system"].) Adopted with the best of intentions, the Act and guild regulations aimed at protecting artists evidently have resulted in a limited pool of licensed talent agencies and, in combination with high demand for talent agency services, created the right conditions for a black market for unlicensed talent agency services. (See Assem. Labor and Employment Com., Republican Analysis of Sen. Bill No. 1359 (1989-1990 Reg. Sess.) as amended May 1, 1989 [Labor Commissioner believes unlicensed talent agencies outstrip licensed talent agencies two to one].) In the event of any abuses by unlicensed talent agencies, the principal recourse for talent is to raise unlawful procurement as a defense against collection of commissions, but this is a blunt and unwieldy instrument.

It is of little use to unestablished artists, who it appears may legitimately fear blacklisting (*Talent Agencies Act, supra,* 28 Pepperdine L.Rev. at p. 402; *Contested Ascendancy, supra,* 20 Loyola L.A. Ent. L.J. at p. 517), and may well punish most severely those managers who work hardest and advocate most successfully for their clients, allowing the clients to establish themselves, make themselves marketable to licensed talent agencies, and be in a position to turn and renege on commissions (e.g., *Kilcher v. Vainshtein, supra,* TAC No. 02-99; *Contested Ascendancy,* at p. 517).

We, of course, have no authority to rewrite the regulatory scheme. In the end, whether the present state of affairs is satisfactory is for the Legislature to decide, and we leave that question to the Legislature's considered judgment.

DISPOSITION

For the foregoing reasons, we affirm the Court of Appeal's judgment and remand this case for further proceedings consistent with this opinion.

WERDEGAR, J.

WE CONCUR:

KENNARD, ACTING C.J.,
BAXTER, J.
CHIN, J.
MORENO, J.
CORRIGAN, J.
MCADAMS, J.*

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* Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Acting Chief Justice pursuant to article VI, section 6 of the California Constitution.

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ARNOLD M. PRESTON, PETITIONER

v.

ALEX E. FERRER, RESPONDENT

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION ONE

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the rule announced in *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006), forecloses a plaintiff's attempt to avoid arbitration by challenging the validity of the contract as a whole—not the arbitration provision—in a state administrative proceeding.

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Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (1998) 22

Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61 (2005)..... 17

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

This is the latest in a long series of cases in which this Court has been called upon to address increasingly creative efforts by state courts to evade the requirements of the Federal Arbitration Act ("FAA").[1] The FAA creates a rule of substantive federal law that generally requires enforcement of private agreements to arbitrate. See 9 U.S.C. § 2; *Volt Info. Sciences, Inc.* v. *Board of Trs. of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 478 (1989); *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987). Consistent with the text and purpose of the FAA, this Court has held that a party to such an agreement cannot avoid arbitration simply by challenging the validity of the contract containing the arbitration provision. As the Court explained in *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 449 (2006), "regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator."

The court below purported to distinguish *Buckeye* on the ground that it did not involve an administrative proceeding. But that distinction makes no difference, because the rule in *Buckeye* does not depend upon the forum employed as an alternative to arbitration. In fact, the reasoning of *Buckeye* compels the

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.6, the *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, its members, or its counsel made a monetary contribution to preparation or submission of this brief.

conclusion that a litigant may not avoid arbitration by challenging the validity of the contract as a whole in *any* other forum, judicial or administrative. Thus, to the extent that California law requires an administrative agency, rather than an arbitrator, to decide whether the contract is valid and enforceable, California law is preempted by the FAA.

The rule of *Buckeye* is critically important to vindicating the FAA's underlying policies. This Court has recognized that the FAA was intended to "overcome courts' refusals to enforce agreements to arbitrate," *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 270 (1995), and to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). By sidestepping *Buckeye* and allowing respondent to pursue a costly and time-consuming administrative proceeding rather than abide by his agreement to arbitrate, the court below exhibited just the kind of hostility to arbitration that Congress and this Court have clearly (and repeatedly) rejected.

In sum, the decision below cannot be reconciled with the FAA or this Court's decisions applying it, and the decision therefore should be reversed.

This issue is especially important to the Chamber of Commerce of the United States of America—the world's largest business federation, representing more than three million businesses, state and local chambers of commerce, and professional organizations. Many of the Chamber's members routinely enter arbitration agreements because they believe—and recent studies confirm—that arbitration is a relatively fast, fair, and inexpensive method of resolving

disputes with consumers and other contracting parties. Because many Chamber members may be sued in state courts or before administrative agencies, they rely on "rigorous[ ] enforce[ment]" of the FAA to ensure that they will not be deprived of the real benefits of arbitration, benefits for which they have bargained. *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). That is why the Chamber has filed *amicus* briefs in other recent arbitration cases, including *Buckeye*, *supra*, *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), and *PacifiCare Systems, Inc.* v. *Book*, 538 U.S. 401 (2003). In this case too, the Chamber seeks to advance its members' continuing interest in the full vindication of the "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses Cone*, 460 U.S. at 24.

STATEMENT

This case arises from a personal management contract between petitioner Arnold Preston and respondent Alex Ferrer. The contract contained a standard arbitration provision covering not only the substantive dispute between the parties but also any dispute relating to the "validity or legality" of the contract itself. *Ferrer* v. *Preston*, 145 Cal. App. 4th 440, 444-444 (Cal. Ct. App. 2006); *id.* at 448-449 & n.1 (Vogel, J., dissenting). It is undisputed that this contract "evidenc[es] a transaction involving commerce" (9 U.S.C. § 2) and thus is subject to the FAA. It is also undisputed that Ferrer has never specifically challenged the validity of that provision. Nevertheless, Ferrer resisted arbitration of a fee dispute with petitioner on the ground that the contract as a whole was invalid under California's Talent Agencies Act, Cal. Lab. Code §§ 1700 *et seq.* The superior court granted

Ferrer's request to enjoin arbitration proceedings and denied petitioner's motion to compel arbitration.

A divided panel of the California Court of Appeal affirmed the superior court's ruling. The majority held that Ferrer's challenge to the validity of the contract as a whole must be determined in the first instance by the Labor Commissioner, not an arbitrator. *Ferrer*, 145 Cal. App. 4th at 446. According to the majority, California law grants the Labor Commissioner *exclusive* jurisdiction over controversies arising under the Talent Agencies Act, subject to an appeal to the superior court. See *id.* at 444-447.

To reach this result, the court below had to distinguish this Court's recent decision in *Buckeye*, *supra*, which held that a party cannot avoid arbitration by attacking the validity of the contract as a whole. But the only reason the court gave for distinguishing *Buckeye* was that it "did not involve an administrative agency with exclusive jurisdiction over a disputed issue" and "did not consider whether the FAA preempts application of the exhaustion [of administrative remedies] doctrine." *Ferrer*, 145 Cal. App. 4th at 447.

As the dissent pointed out, the majority's holding that Ferrer could take his challenge to the administrative agency effectively rewrote the parties' contract and denied petitioner the benefits of arbitration rights for which he had bargained: "Instead of the speedy, efficient, and relatively inexpensive procedure contemplated by the parties' contract, [the majority has] permitted Ferrer to cause a delay of years and triple or quadruple the parties' expenditures. That is not how it is supposed to work." *Id.* at 451 (Vogel, J., dissenting) (citation omitted).

SUMMARY OF ARGUMENT

As explained in Section I below, *Buckeye* controls this case and requires reversal. This Court made clear in *Buckeye* that *any* challenge to the validity of the contract containing an arbitration provision must be resolved by the arbitrator. The fundamental propositions on which that conclusion depend are not affected by the fact that the alternative forum to arbitration is an administrative forum rather than a judicial one. When *Buckeye* reserved to the arbitrator authority to determine the validity of the contract as a whole, it precluded any other decisionmaker from making that determination. To the extent that California law requires a contrary result in cases involving contracts covered by the FAA, California law is preempted by that statute, as definitively construed in *Buckeye*.

As shown in Section II, the decision below also undermines the core objectives of the FAA. Indeed, by ignoring *Buckeye* and allowing Ferrer to avoid his clear agreement to arbitrate, the decision below requires the parties to employ a more expensive and time-consuming dispute resolution procedure than the one for which they freely bargained. The decision below thus reflects the very kind of judicial hostility to arbitration that the FAA, and this Court's decisions construing it, were designed to eradicate.

If left in place, moreover, the decision below will deprive litigants throughout California—and any other states that adopt the approach of the court below—of the substantial benefits of arbitration, which Congress sought to protect when it enacted the FAA. Those benefits include the ability to resolve legal disputes more quickly and at a lower cost than the par-

ties could do in most courts. Recent data demonstrate that these benefits remain as important today as they were when the FAA was enacted. And a reversal is necessary to ensure that those benefits are not lost as a result of residual judicial hostility to arbitration.

ARGUMENT

I. Under Settled Law, Challenges To The Validity Of The Contract As A Whole Must Be Resolved By The Arbitrator, Not An Administrative Agency.

There can be little doubt that the decision below is flatly contrary to *Buckeye*. Although *Buckeye* did not involve an administrative action, the Court's reasoning, as we explain below, compels the conclusion that any challenge to the validity of the contract as a whole must be decided by the arbitrator alone—not a court *or* an administrative agency. And any state law that would otherwise require a different result—in this case California's Talent Agencies Act—is to that extent preempted by the FAA.

A. Under the FAA, as construed in *Buckeye* and other decisions, a challenge to the validity of the contract as a whole must be resolved by the arbitrator.

Buckeye relied heavily upon this Court's decision in *Prima Paint* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 404 (1967), which held that a federal court considering a petition to compel arbitration under Section 4 of the FAA or an application for a stay pending arbitration under Section 3 "may consider only issues relating to the making and performance of the *agreement to arbitrate*." (Emphasis added.) More specifically, the Court explained that

"if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally." *Id.* at 403-404 (footnote omitted). Thus, under *Prima Paint*, a litigant in federal court could not resist arbitration by attacking the validity of the contract as a whole.

1. *Buckeye* held that the same rule applies to litigants resisting arbitration by resorting to state courts. See 546 U.S. at 449. The plaintiffs there had filed a putative class action in Florida state court, alleging that a check-cashing company charged usurious interest rates and that its contract with the plaintiffs was illegal on its face. See *id.* at 443. The plaintiffs sought to avoid their written agreement to arbitrate on the ground that the contract as a whole was void *ab initio*, such that the arbitration agreement was unenforceable. See *ibid.* The trial court denied the defendant's motion to compel arbitration, and the state supreme court affirmed that ruling. See *ibid.*

This Court reversed, explaining that *Prima Paint*, together with *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), establish three fundamental propositions of federal arbitration law: *first*, that "an arbitration provision is severable from the remainder of the contract"; *second*, that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance"; and *third*, that "this arbitration law applies in state as well as federal courts." *Buckeye*, 546 U.S. at 445-446. Applying these bedrock principles, the

Court in *Buckeye* held that "regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.* at 449.

2. The court below purported to distinguish *Buckeye* on the ground that the Talent Agencies Act allows respondent to ask the Labor Commissioner to determine (preliminarily) the validity of the management contract as a whole. But *Buckeye* cannot be dismissed so easily.

For one thing, notwithstanding the administrative-agency wrinkle, this is still a case, like *Buckeye*, in which a state court has now allowed a litigant to avoid his arbitration agreement based on his challenge to the validity of the contract as a whole—a result that *Buckeye* plainly forbids. See 546 U.S. at 446.

Moreover, the fact that Ferrer asked an administrative agency rather than a court to determine the validity of the contract as a whole is irrelevant. None of the three propositions of arbitration law on which *Buckeye* depends is affected by the identity of the alternative forum. The point of *Buckeye* (and *Prima Paint*) is that the arbitration agreement is severable from the remainder of the contract, and disputes relating to the remainder of the contract "must go to the arbitrator. *Id.* at 449. Thus, the fact that California law allowed Ferrer to file a petition with the Labor Commissioner is no ground on which to distinguish *Buckeye*. Under the FAA, it is for the arbitrator—and no one else—to decide whether the man-

agement contract as a whole is a valid, enforceable contract.[2]

The court below failed to identify any characteristic of administrative procedure that would distinguish this case from *Buckeye* in any material respect. And this Court has already rejected the argument that the prominence of an administrative agency in enforcing statutory rights counsels against enforcing arbitration agreements. See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28-29 (1991) (citing *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220 (1987), and *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989)). Indeed, this Court has held that a federal age discrimination claim may be arbitrated, notwithstanding the important role of the EEOC in enforcing the Age Discrimination in Employment Act, because "the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration." *Gilmer*, 500 U.S. at 28-29.

So too here: the "mere involvement" of the California Labor Commissioner is plainly "not sufficient to preclude arbitration" under this Court's precedents.

B. The FAA preempts any state law, including California's Talent Agencies Act, that would require a result contrary to *Buckeye*.

The court below rested its contrary conclusion on California case law holding that the Talent Agencies

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[2] Indeed, this Court itself has declined to interpret a contract where the FAA committed the issue to the arbitrator. See *Bazzle*, 539 U.S. at 451-453.

Act confers upon the Labor Commissioner *exclusive* jurisdiction to resolve disputes involving that statute in the first instance. See 145 Cal. App. 4th at 444-447 (citing *Styne* v. *Stevens*, 26 P.3d 343 (Cal. 2001), and *Buchwald* v. *Superior Court*, 254 Cal. App. 2d 347 (Cal. Ct. App. 1967)). But even assuming that the Talent Agencies Act was properly invoked in this case,[3] that statute—as applied by the court below—frustrates Congress' purpose in enacting the FAA and is therefore preempted.

1. This Court has described Section 2 of the FAA as "a congressional declaration of a liberal federal policy favoring arbitration agreements, *notwithstanding any state substantive or procedural policies to the contrary*. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses Cone*, 460 U.S. at 24 (emphasis added). And it is by now well settled that the FAA is "enforceable in both state and federal courts." *Perry*, 482 U.S. at 489; see also *Doctor's Associates* v. *Casarotto*, 517 U.S. 681, 684-686 (1996); *Allied-Bruce*, 513 U.S. at 272; *Southland*, 465 U.S. at 12, 15.[4] In-

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[3] The parties executed a personal management contract, not a talent agent's contract. Nevertheless, Ferrer invoked the Talent Agencies Act by "claim[ing] the agreement is not what it appears to be." 145 Cal. App. 4th at 450 (Vogel, J., dissenting).

[4] As recently as 2001, this Court reaffirmed the essential holding of *Southland*. See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 122 (2001) ("The question of *Southland*'s continuing vitality was given explicit consideration in *Allied-Bruce*, and the Court declined to overrule it"). Even Justice O'Connor, who dissented in *Southland*, concurred in *Allied-Bruce* based on "considerations of *stare decisis*." 513 U.S. at 283-284 ("I acquiesce in today's judgment because there is no 'special justification' to overrule *Southland*. It remains now for Congress to correct this

deed, "[i]n creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Southland*, 465 U.S. at 16 (footnote omitted).

Accordingly, this Court has held that the Supremacy Clause requires enforcement of the FAA rather than a contrary state law. Although "[t]he FAA contains no express pre-emptive provision" and does not "occupy the entire field of arbitration," "state law may nonetheless be pre-empted * * * to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Volt*, 489 U.S. at 477 (1989) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). Thus, "[i]n recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms," this Court has held that "the FAA pre-empts state laws which require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 478 (quotations omitted).

The Court has repeatedly applied that principle in other contexts. For example, in *Perry* v. *Thomas*, *supra*, this Court held that another provision of California's Labor Code, Section 229, could not be applied to arbitration agreements. That section provided that actions for collection of wages could be pursued in state court "without regard to the existence of any private agreement to arbitrate." 482 U.S. at 484. But the Court held that this anti-arbitration provision stood in "unmistakable conflict" with the FAA,

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interpretation if it wishes to preserve state autonomy in state courts") (citation omitted).

and concluded that "under the Supremacy Clause, the state statute must give way." *Id.* at 491. Similarly, in *Doctor's Associates* v. *Casarotto*, *supra*, the Court held that the FAA preempted a Montana statute providing that a contract containing an arbitration provision must give notice of that provision on the first page of the contract. 517 U.S. at 686-688.

These decisions make clear that where a state law impedes the simple enforcement of arbitration agreements according to their terms, it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and is therefore preempted by the FAA. *Volt*, 489 U.S. at 477; *Hines*, 312 U.S. at 67.

2. Undoubtedly, the Talent Agencies Act (as interpreted by California courts) impedes the accomplishment of congressional objectives in the FAA in two ways. *First*, under the decision below, that Act requires the Labor Commissioner to determine the validity of the management contract as a whole, even though the arbitration agreement and the FAA (as interpreted in *Buckeye* and *Prima Paint*) commit that determination to the arbitrator alone.

Second, the Talent Agencies Act purports to supplement the requirements of the FAA. Construing Section 2 of the FAA, this Court has explained that the FAA recognizes "only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: [1] they must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and [2] such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.'" *Southland*, 465 U.S. at 10-11 (footnote omitted). Here, the

contract undisputedly evidences a transaction involving commerce, and respondent has not claimed that the arbitration provision is invalid under any generally applicable principle of law or equity.

The Talent Agencies Act itself recognizes the validity of arbitration provisions in contracts to which it applies. But it conditions the validity of such provisions on the parties' agreeing to give notice to the Labor Commissioner and to allow his attendance at any arbitration hearings. Cal. Lab. Code § 1700.45(c)-(d). Because this provision thus purports to impose "additional limitations" on arbitration agreements, it conflicts with the FAA for that reason as well. *Southland*, 465 U.S. at 10-11; see also *Doctor's Assocs.*, 517 U.S. at 683; *Perry*, 482 U.S. at 491.

Given the "unmistakable conflict" (*Perry*, 482 U.S. at 491) between the Talent Agencies Act and the FAA, the court below was required to apply the FAA and this Court's decision in *Buckeye*, notwithstanding anything to the contrary in the Talent Agencies Act. As the Supremacy Clause itself provides: "the Laws of the United States * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, *any Thing* in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI (emphasis added). State administrative proceedings are thus not excepted from the Clause's comprehensive scope.

For all these reasons, the court below erred in concluding that the Labor Commissioner must determine, in the first instance, the validity of the agreement at issue here, and the decision below must therefore be reversed.

II. Reversal Is Necessary To Eliminate Remaining Judicial Hostility To Arbitration And To Ensure That Businesses And Others Can Enjoy The Benefits Of Arbitration.

In disregarding this Court's decision in *Buckeye* and allowing Ferrer to avoid his clear agreement to arbitrate, the decision below represents only the latest example of some state courts' continuing hostility to private arbitration agreements—the very problem that the FAA was intended to overcome. As a result of that decision, the parties in this case have been deprived of the opportunity to realize the economies and efficiencies of private dispute resolution for which they bargained. As the dissent below put it, "[i]nstead of the speedy, efficient, and relatively inexpensive procedure contemplated by the parties' contract, [the majority below has] permitted Ferrer to cause a delay of years and triple or quadruple the parties' expenditures." 145 Cal. App. 4th at 451 (Vogel, J., dissenting). Reversal will not only help root out remaining judicial hostility to arbitration, but will also ensure that businesses and other parties to arbitration agreements can realize the significant advantages of arbitration over litigation.

A. The decision below reflects continuing judicial hostility to arbitration.

Given the implausibility of its legal reasoning, the decision below can only be understood as the latest example of that "longstanding judicial hostility to arbitration agreements" that the FAA was intended to overcome. *Gilmer*, 500 U.S. at 24.

1. As explained in a 1924 congressional report issued in connection with the FAA, "[s]ome centuries

ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction." H.R. Rep. No. 68-96, at 1-2 (1924) (cited in *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974)); see S. Rep. No. 68-536, at 2 (1924). This practice "became firmly embedded in the English common law and was adopted with it by the American courts." H.R. Rep. No. 68-96, at 2. Justice Story explained the traditional practice in *Tobey* v. *County of Bristol*, 23 F. Cas. 1313, 1321 (C.C. Mass. 1845):

> It is certainly the policy of the common law, not to compel men to submit their rights and interests to arbitration, or to enforce agreements for such a purpose. Nay, the common law goes farther, and even if a submission has been made to arbitrators, who are named, by deed or otherwise, with an express stipulation, that the submission shall be irrevocable, it still is revocable and countermandable, by either party, before the award is actually made, although not afterwards.

Citing *Tobey* as a leading example, this Court later observed that "[t]he federal courts—like those of the states and of England—have, both in equity and at law, denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes. They have declined to compel specific performance, or to stay proceedings on the original cause of action." *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 120-121 (1924) (citations omitted). "It [was] very old law," a Senate Report explained, "that the performance of a written agreement to arbitrate would not be enforced in equity * * * * [S]uch agreements were in large part inef-

fectual, and the party aggrieved by the refusal of the other party to carry out the arbitration agreement was without adequate remedy." S. Rep. No. 68-536, at 2.

Congress enacted the FAA in 1925 specifically to "overcome [this] judicial resistance to arbitration." *Buckeye*, 546 U.S. at 443; see *Circuit City*, 532 U.S. at 111 ("the FAA was a response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice"); *Allied-Bruce*, 513 U.S. at 270 (1995) ("the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate"); *Scherk*, 417 U.S. at 510 (the FAA "revers[ed] centuries of judicial hostility to arbitration agreements"). As this Court explained in *Southland*, "[t]he problems Congress faced were * * * twofold: the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements." 465 U.S. at 14. With the FAA now more than 80 years old, institutional hostility to arbitration agreements should be a relic of the past.

2. Unfortunately, this hostility remains apparent in other recent decisions from California courts. For example, California courts have refused to enforce arbitration provisions in health care service plans based on failure to comply with unique statutory disclosure requirements.[5] California courts have also

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[5] *E.g.*, *Robertson* v. *Health Net of Cal., Inc.*, 132 Cal. App. 4th 1419 (Cal. Ct. App. 2005); *Imbler* v. *PacifiCare of Cal., Inc.*, 103 Cal. App. 4th 567 (Cal. Ct. App. 2002); *Smith* v. *PacifiCare Behavioral Health of Cal., Inc.*, 93 Cal. App. 4th 139 (Cal. Ct. App. 2001).

recently invoked the amorphous doctrine of unconscionability to give plaintiffs a way out of their arbitration agreements.[6] Indeed, California courts have applied a stricter form of unconscionability analysis in arbitration cases, and as a result, "unconscionability challenges succeed more frequently when the contractual provision at issue is an arbitration agreement." Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 47 (2006) (finding that courts found at least a portion of an arbitration provision unconscionable in 68 out of 114 cases, while courts found non-arbitration contract provisions unconscionable in only 5 out of 46 cases).

As these examples make clear, "the same judicial hostility ostensibly thwarted eighty years ago continues today, albeit in a more subtle—but equally hostile—form," at least in California. Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 61 (2005); see *Gentry*, 42 Cal. 4th at 473 (Baxter, J., dissenting) (noting the California Supreme Court's "continuing effort to limit and restrict

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[6] *E.g.*, *Gentry* v. *Superior Court*, 42 Cal. 4th 443 (Cal. 2007); *Discover Bank* v. *Superior Court of Los Angeles*, 113 P.3d 1100 (Cal. 2005); *Armendariz* v. *Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000); *Fitz* v. *NCR Corp.*, 118 Cal. App. 4th 702 (Cal. Ct. App. 2004); *Abramson* v. *Juniper Networks, Inc.*, 115 Cal. App. 4th 638 (Cal. Ct. App. 2004); *O'Hare* v. *Municipal Res. Consultants*, 107 Cal. App. 4th 267 (Cal. Ct. App. 2003); *Flores* v. *Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846 (Cal. Ct. App. 2001).

the terms of private arbitration agreements, which enjoy special protection under both state and federal law"). And because California's economy is the largest in the Nation and, indeed, the eighth-largest economy in the world (with a gross state product exceeding $1.6 trillion), continuing hostility to arbitration in California is a significant problem for businesses nationwide. See California Legislative Analyst's Office, *2006 Cal Facts: California's Economy and Budget in Perspective*, available at http://www.lao.ca.gov/2006_cal_facts/pdf.

B. The decision below deprives both businesses and individuals of the substantial benefits of arbitration.

Such hostility often deprives businesses and individuals of the substantial benefits of arbitration—benefits that are often at the heart of an arbitration contract.

1. The "preeminent concern" of Congress when it enacted the FAA was "to enforce private agreements into which parties had entered." *Dean Witter Reynolds*, 470 U.S. at 221. Accordingly, the Act "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt*, 489 U.S. at 478; accord *Circuit City*, 532 U.S. at 111 ("the FAA compels judicial enforcement of a wide range of written arbitration agreements"); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (the FAA manifests "a policy guaranteeing the enforcement of private contractual agreements"); *Southland*, 465 U.S. at 10 ("Congress has * * * mandated the enforcement of arbitration agreements"). Because "[a]rbitration under the Act is a matter of con-

sent, not coercion," the parties may "structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479; see *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995) (the parties may decide which issues should be submitted to the arbitrator). But, however the parties structure their agreement, the FAA commands that a court must *enforce* that agreement according to its terms.

The decision below undermines this fundamental objective of the FAA. The parties' agreement in this case could not be clearer: "[A]ny dispute under or relating to the terms of [the management contract], or the breach, validity, or legality thereof" must be resolved through arbitration rather than litigation. Ferrer has never challenged the validity or the scope of this agreement. Instead, his sole defense to arbitration is the allegation that the management contract as a whole is invalid under the Talent Agencies Act. But that is just a "dispute * * * relating to * * * the breach, validity, or legality" of the management contract, which the parties expressly agreed should be resolved in arbitration. 145 Cal. App. 4th at 449 n.1.

By relieving Ferrer of his contractual duty to arbitrate issues relating to the validity or legality of the management contract, the decision below fails to enforce the parties' bargained-for agreement. And to make matters worse, the decision below undermines, for businesses and individuals throughout California, Congress' "preeminent" purpose in enacting the FAA.

2. Congress and this Court have identified several compelling reasons why contracting parties frequently prefer arbitration to litigation. Shortly before enactment of the FAA, Congress heard testimony

that "arbitration saves time, saves trouble, [and] saves money. * * * It preserves business friendships. * * * It maintains business honor, prevents unnecessary litigation, and eliminates the law's delay by relieving our courts." *Joint Hrgs. Before the Subcomms. of the Comms. on the Judiciary on S. 1005 and H.R. 646*, 68th Cong., 1st Sess. 7 (1924) (Statement of Charles L. Bernheimer, Chamber of Commerce of New York). Similarly, a House Report explained that "the costliness and delays of litigation * * * can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable." H.R. Rep. No. 68-96, at 2. And a Senate Report concluded that action was needed because "[t]he desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expenses increase. The settlement of disputes appeals to big business and little business alike, to corporate interests as well as to individuals." S. Rep. No. 68-536, at 3.

Nearly 60 years after the FAA was enacted, Congress observed that "[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearings and discovery devices." H.R. Rep. No. 97-542, at 13 (1982). Thus, decades of experience under the FAA regime have only confirmed that arbitration is fundamentally beneficial for parties engaged in commerce.

This Court likewise has recognized the benefits of arbitration as well, explaining that "it is often a judg-

ment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies." *Mitsubishi Motors*, 473 U.S. at 633. Thus, parties to arbitration agreements elect to trade "the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Gilmer*, 500 U.S. at 31.

3. The assessments of Congress and this Court accurately reflect the perceptions of private parties considering alternative methods of dispute resolution as well as relevant empirical data.

Survey research confirms that participants in arbitrations perceive distinct advantages to this method of dispute resolution. For example, in a 2005 survey conducted by Harris Interactive on behalf of the Chamber's Institute for Legal Reform, most respondents described the arbitrations in which they participated as faster (74 percent), simpler (63 percent), and less expensive (51 percent) than litigation. See *Arbitration: Simpler, Cheaper, and Faster Than Litigation* 5 (Institute for Legal Reform, April 2005).[7] Not surprisingly, about two-thirds of respondents said they would likely use arbitration again. See *ibid.*

These perceptions of the benefits of arbitration find ample support in available empirical research. For example, the authors of one study comparing ar-

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[7] Available at www.instituteforlegalreform.org/resources/ArbitrationStudyFinal.pdf.

bitration and litigation of employment-related claims concluded that "[b]y any measure, the arbitrations terminated more quickly than the litigations. The mean and median times in arbitration ranged from about seven to 13 months. The mean and median litigation times in both federal and state courts all exceeded 20 months." Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58-Jan. Dispute Resolution J. 44, 51 (2004). Another commentator reported in 1998 that "[t]he average case in arbitration is resolved in 8.6 months, less than half of the time required for civil litigation." Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 55 (1998).

Data on pending court cases confirm this conclusion. For example, as of September 30, 2006, more than 40 percent of all civil cases pending in the federal district courts had been pending for one year or longer. See Federal Judicial Center, *Judicial Business of the United States Courts 2006*, at 195-197 (Table C-6). Eleven percent of cases had been pending for *three years* or longer. See *id.* at 195. The median interval from filing to disposition of civil cases resolved by trial was 23.5 months—significantly longer than the average arbitration. See *id.* at 192-104 (Table C-5).

4. The financial and other risks created by the decision below to other California litigants are well illustrated by the facts of this case. Under California law, Ferrer's administrative proceeding is apparently only a prelude to further litigation. Section 1700.44(a) provides that "[i]n cases of controversy arising under [the Talent Agencies Act], the parties involved shall refer the matters in dispute to the La-

bor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard *de novo*." And to take the case to the superior court for this trial *de novo*, the aggrieved party must post a bond of at least $1,000 and up to twice the amount of any judgment approved by the Commissioner. See Cal. Lab. Code § 1700.44(a).

Thus, by allowing Ferrer to litigate the validity of the management contract before the Labor Commissioner rather than the arbitrator, the decision below actually exacerbates the harm caused by Ferrer's refusal to arbitrate. In the typical case, a party seeking to compel arbitration might be forced into state-court litigation, costly and time-consuming as that may be. But the result in this case is even worse, because the decision below forces petitioner to spend *additional* time and money merely to satisfy a *condition precedent* to state-court litigation, perhaps including another appeal.

This case thus calls to mind this Court's admonition that allowing a litigant to evade his agreement to arbitrate "could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland*, 465 U.S. at 7. Reversal will spare petitioner—and other California litigants—from that perverse fate.

* * * * *

This Court has recognized "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404. Indeed, Congress intended "to move the parties to an arbitrable

dispute out of court and into arbitration as quickly and easily as possible." *Moses Cone*, 460 U.S. at 22; see *Southland*, 465 U.S. at 7. Yet the court below ratified Ferrer's "delay and obstruction," thereby depriving petitioner of the full benefits of arbitration and, at the same time, providing a blueprint for eviscerating the FAA and *Buckeye* in other state courts, in California and elsewhere. For businesses subject to suit in those jurisdictions, that is an intolerable result.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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No. 06-1463

In the Supreme Court of the United States

ARNOLD M. PRESTON,

Petitioner,

v.

ALEX E. FERRER

Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division One

BRIEF OF CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

CTIA—The Wireless Association® submits this brief as *amicus curiae* in support of petitioner Arnold M. Preston.[1]

INTEREST OF THE *AMICUS CURIAE*

CTIA—The Wireless Association®, formerly known as the Cellular Telecommunications & Internet Association ("CTIA"), represents all sectors of the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and internet companies, as well as other contributors to the wireless universe. CTIA frequently participates in regulatory and judicial proceedings and coordinates efforts to educate government agencies and the public about wireless issues.

Many of CTIA's members have adopted as standard features of their business contracts provisions that in appropriate circumstances mandate the arbitration of disputes arising from or relating to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes. CTIA sponsored the Wireless Industry Arbitration Rules (see http://www.adr.org/sp.asp?id=22214), which are administered by the American Arbitration Association and which have been incorpo-

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, and its counsel made a monetary contribution to this brief's preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

rated in the arbitration agreements of many members of the industry.

CTIA is concerned about efforts by California and other States to deem certain disputes or claims to be non-arbitrable. Accordingly, CTIA has a strong interest in urging this Court to make clear once and for all that only Congress, not the States, may exempt claims from the Federal Arbitration Act ("FAA") or impose pre-conditions to the enforcement of agreements to arbitrate disputes.

SUMMARY OF ARGUMENT

The FAA establishes "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Despite the longstanding existence of this liberal federal policy and the numerous decisions of this Court applying it, a number of States—most notably, California—continue to construct obstacles to the enforcement of private agreements. The California Talent Agencies Act ("CTAA") is but the latest such obstacle.

The CTAA specifies that cases arising under the Act must first be submitted to the California Labor Commissioner, whose decision will then be reviewed de novo by the Superior Court. The statute allows disputes to be arbitrated, but only if the parties' arbitration agreement (i) requires the parties to notify the Labor Commissioner of the time and place of all arbitration hearings and (ii) authorizes the Commissioner to attend all hearings. These limitations on the right to arbitrate cannot be reconciled with this Court's clear holdings that States may not declare disputes or claims off limits to arbitration (*South-*

land Corp. v. *Keating*, 465 U.S. 1, 10 (1984); *Perry* v. *Thomas*, 482 U.S. 483, 491 (1987)) or condition the enforceability of arbitration agreements on compliance with special requirements that are not applicable to contracts generally (*Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996)).

The premise of the California courts that States may nonetheless make a dispute or claim nonarbitrable whenever they decide that arbitration is "inherently inconsistent" with the achievement of the purposes of the statute is simply wrong. This Court has said that Congress may make that judgment, but it turns the Supremacy Clause on its head to suggest that States may do so.

Indeed, this and other California decisions amply demonstrate that the "longstanding judicial hostility to arbitration" that the FAA was enacted to reverse more than eighty years ago (*Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)) remains alive and well in that State. We accordingly urge the Court to take this opportunity to reaffirm in strong and clear terms that States have no power to place any dispute or claim off limits to arbitration and that the FAA preempts any state law that imposes special requirements or limitations on agreements to arbitrate. A broad holding to that effect is necessary to avoid repeated, burdensome litigation over the validity of state statutes and common-law doctrines that are contrary to the FAA but nonetheless remain in force in California and elsewhere. See *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995) (the FAA should be interpreted so as to avoid "breeding litigation from a statute that seeks to avoid it").

ARGUMENT

The decision below is part of a much broader pattern of attacks on arbitration in California. The California Legislature and courts have for decades demonstrated distrust of arbitration by seeking to declare various disputes or claims to be non-arbitrable or, as in this case, arbitrable only if certain onerous conditions are satisfied.[2]

First, the California Legislature tried to make claims under the Franchise Investment Law non-arbitrable. This Court held that effort preempted by the FAA. *Southland*, 465 U.S. at 10. Next, the Legislature tried to place certain wage-collection claims under the California Labor Code off limits to arbitration. This Court struck down that effort too. *Perry*, 482 U.S. at 491.

Undeterred, the California Supreme Court held that claims for so-called "public" injunctive relief under the Consumer Legal Remedies Act ("CLRA") and Unfair Competition Law ("UCL") are non-arbitrable. See *Broughton* v. *Cigna Healthplans of Cal.*, 988 P.2d 67, 71 (Cal. 1999) (CLRA); *Cruz* v. *Pacificare Health Sys., Inc.*, 66 P.3d 1157, 1159 (Cal. 2003) (UCL). And during the same time frame, it held that discrimination claims brought under the Fair Employment and Housing Act are arbitrable only if the arbitration agreement in question provides for, *inter alia*, "more than minimal" discovery and a written

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[2] For a detailed discussion of California's hostility to arbitration, see Stephen P. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006).

ruling. *Armendariz* v. *Found. Health Psychare Servs., Inc.*, 6 P.3d 669, 682-689 (Cal. 2000).

Most recently, the California Supreme Court held that in cases seeking redress for the failure to pay statutorily required overtime, courts should refuse to enforce an arbitration provision calling for individual arbitration of disputes "if a trial court determines * * * that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration." *Gentry* v. *Superior Court*, 165 P.3d 556, 559 (Cal. 2007).

The same mistaken premise underlies *Broughton*, *Cruz*, *Armendariz*, *Gentry*, and the decision below: that the State is free to declare certain disputes or claims to be non-arbitrable as a matter of public policy or to impose conditions on the enforcement of arbitration provisions whenever it believes that such conditions are necessary to advance "unwaivable statutory rights" (*Gentry*, 165 P.3d at 559). According to the California Supreme Court, this Court has acknowledged that if there is an "inherent conflict" between arbitration and a statute's underlying purpose, a dispute or claim under that statute may be declared non-arbitrable. *Broughton*, 988 P.2d at 73-74. But this premise is valid only when the statute is a *federal* one. The persistent failure of the California courts to recognize that only *Congress*—not the State of California—has the constitutional authority to displace the FAA requires reversal of the decision below and condemnation of the line of cases of which it is part.

A. The FAA Preempts Any State Law That Either Imposes Special Requirements On Arbitration Agreements Or Declares Disputes Or Claims Non-Arbitrable.

As this Court has explained on several occasions, Congress's purpose in enacting the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer*, 500 U.S. at 24. Nearly a quarter of a century ago, this Court declared that "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, *notwithstanding any state substantive or procedural policies to the contrary*." *Moses H. Cone*, 460 U.S. at 24 (emphasis added). Its "effect * * * is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act" and "to establish[] that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 24-25.

Applying these principles, this Court has already twice rejected efforts by the State of California to render certain disputes non-arbitrable. In *Southland*, the California Supreme Court had construed the California Franchise Investment Law to render claims under that law non-arbitrable. *Keating* v. *Superior Court*, 645 P.2d 1192, 1198-1203 (Cal. 1982). This Court reversed, declaring that "[s]o interpreted the California Franchise Investment Law directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause." *Southland*, 465 U.S. at 10. The Court explained that, "[i]n enacting [Sec-

tion] 2 * * *, Congress * * * withdrew the power of the States to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Ibid.* In doing so, Congress "intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 16. Thus, whenever an arbitration agreement involves interstate commerce and does not implicate a ground that existed at law or equity for the revocation of "any contract," Section 2's "broad principle of enforceability" is *not* "subject to any additional limitations under state law." *Id.* at 10-11.

Just three years later, the Court was again called on to review an attempt by California to make certain claims non-arbitrable—this time, claims under the wage-collection provisions of the California Labor Code. *Perry*, 482 U.S. 483. The Court forcefully reiterated the "clear federal policy" established in, *inter alia*, *Moses H. Cone* and *Southland* (*Perry*, 482 U.S. at 489-90) and held that "[t]his clear federal policy places [the FAA] in unmistakable conflict with" California's "requirement that litigants be provided a judicial forum for resolving wage disputes" (*id.* at 491). "Therefore, under the Supremacy Clause, the state statute [had to] give way." *Ibid.* In the concluding footnote of its opinion, the Court emphasized that "state law, whether of legislative or judicial origin is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* at 493 n.9 (emphasis by the Court). However, "[a] state law-principle that takes its meaning precisely from the fact that a contract to

arbitrate is at issue does not comport with * * * [Section] 2." *Ibid.*[3]

The Court's subsequent decisions have also made clear that the FAA's preemptive scope is *not* limited to state statutes that render certain claims or disputes per se non-arbitrable. Rather, Section 2 also preempts laws that "condition[] the enforceability of arbitration agreements on compliance with special * * * requirement[s] not applicable to contracts generally." *Casarotto*, 517 U.S. at 687. Citing *Perry*, the *Casarotto* Court again emphasized that courts simply "may not * * * invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Ibid.* (emphasis by the Court). Applying these principles, the Court struck down a Montana statute that made arbitration provisions unenforceable unless notice of the provision was typed in underlined capital letters on the first page of the parties' agreement. *Id.* at 683, 688.

B. Only Congress, Not State Courts Or Legislatures, Can Limit The Scope Of FAA Preemption.

Over the past two decades, plaintiffs have argued that claims under a wide range of *federal* statutes are non-arbitrable. This Court never once has agreed

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[3] See also, *e.g.*, *Allied-Bruce*, 513 U.S. at 281 (internal quotation marks omitted):

> States may regulate contracts, including arbitration clauses, under general contract law principles * * *. What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal footing, directly contrary to the Act's language and Congress' intent.

that the policies underlying the particular statute at issue could not be adequately vindicated in arbitration. Instead, the Court has consistently held that arbitration is a favored method of resolving "even claims arising under * * * statute[s] designed to further important social policies." *Green Tree Fin. Corp.* v. *Randolph*, 531 U.S. 79, 90 (2001) (holding that claims under the Truth in Lending Act are arbitrable). This is because, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp.* v. *Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (holding that claims under the Sherman Act are arbitrable). It is also because generalized "suspicion of arbitration as a method of weakening the protections afforded in the substantive law" has "fallen far out of step with [the Court's] current strong endorsement" of arbitration. *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (holding that claims under the Securities Act of 1933 are arbitrable).

The Court has, of course, acknowledged that, "[l]ike any statutory directive, the [FAA's] mandate can be overridden by a contrary *congressional* command." *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987) (emphasis added) (holding that RICO claims and claims under the Securities Exchange Act of 1934 are arbitrable). Nonetheless, "[h]aving made the bargain to arbitrate, [a] party should be held to it unless *Congress itself* has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 473 U.S. at 628 (emphasis added); accord *Randolph*, 531 U.S. at 90 ("statutory claims may be arbitrated"

unless "*Congress* has evinced an intention to preclude a waiver of judicial remedies") (emphasis added); *Gilmer*, 500 U.S. at 26 ("the burden is on [the party resisting arbitration] to show that *Congress* intended to preclude a waiver of a judicial forum") (emphasis added).

Overlooking basic principles of federal supremacy, the California Supreme Court asserted in *Broughton* that this Court "has never directly decided whether a [state] legislature may restrict a private arbitration agreement when it inherently conflicts with a public statutory purpose that transcends private interests." 988 P.2d at 78. Having concluded that the issue remained open, the *Broughton* court proceeded to declare it "perverse to extend the policy [favoring enforcement of arbitration provisions] so far as to preclude states from passing legislation the purposes of which make it incompatible with arbitration, or to compel states to permit the vitiation through arbitration of the substantive rights afforded by such legislation." *Id.* at 79. The California courts accordingly have felt themselves free to find "inherent conflicts" and to displace the FAA in case after case. See pages 4-5, *supra*; cf. Pet. App. 11 (holding that the FAA does not preempt a state "statute vesting [a state] agency with exclusive original jurisdiction to decide a challenge based on specific grounds").

This attempted end run around *Southland* and *Perry* is fundamentally wrongheaded. Indeed, *Southland* and *Perry* necessarily rejected the notion that the States have the power to trump the FAA. See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123-124 (2001) ("[T]he argument here is that a state statute ought not be denied state judicial enforce-

ment while awaiting the outcome of arbitration. That matter, though, was addressed in *Southland* and *Allied-Bruce*, and we do not revisit the question here."); see also *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 446 (2005) (*Southland* "rejected the proposition that the enforceability of the arbitration agreement turned on the state legislature's judgment concerning the forum for enforcement of the state-law cause of action"); *Mitsubishi*, 473 U.S. at 623 n.10 ("any contention that the local antitrust claims [arising under Puerto Rico law] are nonarbitrable would be foreclosed by this Court's decision in *Southland* * * *, where we held that the Federal Arbitration Act 'withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration'") (citation omitted). The contrary view—that States retain some measure of discretion to place certain issues or disputes beyond the FAA's reach or otherwise to regulate arbitration agreements—has not prevailed. See, *e.g.*, *Perry*, 482 U.S. at 494-495 (O'Connor, J., dissenting); *Southland*, 465 U.S. at 18, 20-21 (Stevens, J., concurring in part and dissenting in part).

Southland and *Perry* aside, the notion that States can "surgically excise[]" particular categories of arbitration agreements from the coverage of the FAA so as to put them "beyond congressional reach" is inconsistent with the fundamental nature of preemption of state law under the Supremacy Clause. *Gonzalez* v. *Raich*, 545 U.S. 1, 29-30 (2005). "The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, *federal law* shall prevail." *Id.* at 29 (emphasis added). Thus, "[i]t is beyond peradventure that federal power over commerce is superior to that of the States to

provide for the welfare or necessities of their inhabitants, however legitimate or dire those necessities may be." *Ibid.* (citations and internal quotation marks omitted).[4]

As one academic who focuses on arbitration issues has tersely put it, "[t]he difference between the federal and state source of rights is not mere happenstance, but is the centerpiece of federal preemption doctrine under the Supremacy Clause." Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 416 (2004). Therefore, only Congress, not California or any other State, has the power to create exceptions to the FAA by declaring certain claims or disputes to be non-arbitrable. Likewise, the FAA withdraws the States' authority to condition the enforcement of arbitration agreements on compliance with special requirements that are not applicable to contracts generally.

C. The CTAA's Anti-Arbitration Provisions Are Preempted By The FAA.

As just discussed, the implicit premise of the decision below—that California may arrogate to itself the power to displace the FAA—is manifestly false. It follows inexorably that the decision below is unsus-

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[4] There are, of course, Commerce Clause limitations on Congress's power, but "[j]ust as state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause, so too state action cannot circumscribe Congress' plenary commerce power." *Raich*, 545 U.S. at 29 (citation omitted); accord *United States* v. *Darby*, 312 U.S. 100, 114 (1941) (the commerce "power can neither be enlarged nor diminished by the exercise or non-exercise of state power"); cf. *Maryland* v. *Wirtz*, 392 U.S. 183, 196-97 (1968) ("valid general regulations of commerce do not cease to be regulations of commerce because a State is involved").

tainable and that the FAA requires enforcement of the parties' agreement to arbitrate.

The CTAA provides that agreements to arbitrate disputes under that law are enforceable only if they require the parties to notify the California Labor Commissioner of the time and place of all arbitration hearings and authorize the Commissioner to attend (and presumably play a role in) all hearings. Pet. App. 8a-9a & n.2 (describing CAL. LABOR CODE § 1700.45).[5] If an arbitration agreement does not comply with these requirements, the parties must litigate their dispute before two successive tribunals: first, the California Labor Commissioner and, following the Commissioner's decision, the Superior Court, "where the [case] shall be heard de novo." CAL. LABOR CODE § 1700.44.

There can be no question that, standing alone, the requirement that disputes arising under the CTAA be adjudicated in an administrative agency and then in court would be preempted by the FAA. See pages 6-8, *supra*. The fact that California created a limited exemption for arbitration agreements that satisfy the statute's requirements changes nothing.

To begin with, an arbitration provision is enforceable under the CTAA only "[i]f [it] is contained in a contract between a talent agency and" an artist. CAL. LABOR CODE § 1700.45(a). Because petitioner has consistently maintained that he is *not* a talent agent and accordingly is not subject to the CTAA, the statute puts him in a classic Catch-22: He can invoke his right to arbitrate only by making a judicial

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[5] If the Commissioner were to attend an arbitration hearing and express a view on the merits, it is hard to imagine the arbitrator not being influenced thereby.

admission that is fatal on the merits. In other words, in this case and all others like it, the exception is meaningless and might as well not exist.

More fundamentally, the prerequisites to arbitration imposed by the CTAA are not meaningfully distinguishable from the notice requirement that this Court held to be preempted in *Casarotto*. Indeed, they are more burdensome and interfere to a significantly greater extent with contracting parties' freedom under the FAA "to structure their arbitration agreements as they see fit." *Volt Info. Scis.* v. *Bd. of Trs., Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989). Whereas the notice requirement at issue in *Casarotto* merely required the inclusion of a boilerplate notice clause in the parties' contact, the CTAA directly regulates the arbitration proceeding itself, conditioning the enforcement of the arbitration agreement on the parties' amenability to the State's presence (and presumably interference) at the arbitration hearing. As such, there can be no doubt that the CTAA "conditions the enforceability of arbitration agreements on compliance with special * * * requirement[s] not applicable to contracts generally." *Casarotto*, 517 U.S. at 687. It is therefore in direct conflict with this Court's holding in *Casarotto* that States "may not * * * invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Ibid.* (emphasis by the Court); see also Drahozal, *supra*, 79 IND. L.J. at 425 ("Some fundamental principles of FAA preemption are resolved: State laws that single out arbitration are preempted when they invalidate arbitration agreements[.]").

The California Court of Appeal's nullification of the parties' arbitration agreement on the ground that this case "involve[s] an administrative agency

with exclusive jurisdiction over a disputed issue" (Pet. App. 10a) is singularly unpersuasive. To begin with, this Court has already held that "the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration." *Gilmer*, 500 U.S. at 28-29; see also *Saturn Distrib. Corp.* v. *Paramount Saturn, Ltd.*, 326 F.3d 684, 687 (5th Cir. 2003) ("Even if [the state motor vehicle board had exclusive jurisdiction of automobile dealership franchise disputes], the strong federal policy favoring arbitration preempts state laws that act to limit the availability of arbitration.").

Moreover, the theory that States can avoid FAA preemption by assigning disputes to agencies rather than courts is fundamentally devoid of logic. If, as is now clear, the FAA preempts state statutes that preclude arbitration and require litigation in state *courts*, then it necessarily follows that it also preempts statutes that preclude arbitration and require litigation before state *agencies*. The federally protected right to arbitration is no less violated by the former than by the latter; indeed, the violation is greater. "By agreeing to arbitrate," a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628. The CTAA, however, thoroughly frustrates this tradeoff by requiring not only litigation before the Labor Commission but also a de novo hearing in the Superior Court.[6]

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[6] The California Court of Appeal stated that "[t]he fact that the losing party will have a right to a de novo hearing [in the Superior Court], involving additional time and money, does not

Indeed, because the Labor Commissioner's decision is subject to de novo review, the Labor Commissioner is the functional equivalent of a magistrate judge issuing proposed findings and a recommended ruling. Under *Southland* and *Perry*, there can be little doubt that a state statute would be preempted if it provided that statutory claims could not be arbitrated but instead must be heard by a magistrate judge subject to de novo review in a court of general jurisdiction. Because the process established by the CTAA is functionally indistinguishable, the result should be no different. Ultimately, if the Court were to "accept[] [the Court of Appeal's] analysis, states could wholly eviscerate congressional intent to place arbitration agreements upon the same footing as other contracts simply by passing statutes such as the [CTAA]." *Southland*, 465 U.S. at 17 n.11.

To the extent that the Court of Appeal's decision relies on the Labor Commissioner's "expertise in applying the [CTAA]" (Pet. App. 7a (quoting *Styne* v. *Stevens*, 26 P.3d 343, 354 (Cal. 2001)), it fails both under this Court's precedent and on its own terms. "By agreeing to arbitrate," the parties indicated that the "simplicity, informality, and expedition of arbitration" (*Mitsubishi*, 473 U.S. at 628) was more important to them than the expertise of the Labor Commissioner, and federal law requires state courts to respect and enforce that choice. In *Southland*, the Court squarely "rejected the proposition that the enforceability of [an] arbitration agreement turn[s] on

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excuse the defendant from the legal requirement to exhaust his administrative remedies." Pet. App. 12a. Nothing could more clearly confirm the conflict between California law and the FAA. But contrary to the Court of Appeal's implicit assumption, it is California law, not the FAA, that must give way.

the state legislature's judgment concerning the forum for enforcement of [a] state-law cause of action." *Buckeye*, 546 U.S. at 446. "In any event, adaptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal." *Mitsubishi*, 473 U.S. at 633.

Finally, the Court of Appeal's attempt to frame the issue in terms of "jurisdiction" is also unavailing. To begin with, there can be no serious argument that a state legislature may avoid this Court's rulings in *Southland*, *Perry*, and *Buckeye* simply by vesting "exclusive jurisdiction" over the disputes in state courts. Moreover, this Court has held that claims are arbitrable despite being subject to exclusive federal jurisdiction. See *McMahon*, 482 U.S. at 227-28; see also *Mitsubishi*, 473 U.S. at 654 (Stevens, J., dissenting) ("The determination that [Sherman Act claims] are 'too important to be decided otherwise than by competent tribunals' surely cannot allow private arbitrators to assume a jurisdiction that is denied to courts of the sovereign States.") (footnote omitted; quoting *Univ. Life Ins. Co.* v. *Unimarc Ltd.*, 699 F.2d 846, 850-51 (7th Cir. 1983) (Posner, J.)).

In short, the CTAA's requirement that disputes arising under that statute must be brought first to the Labor Commissioner and then to the Superior Court is every bit as preempted by the FAA as were California's previous efforts to put disputes off limits to arbitration in *Southland* and *Perry*. The Court should make clear—yet again—that California lacks the constitutional authority to trump the FAA.

CONCLUSION

The decision of the Court of Appeal should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ARNOLD M. PRESTON,

Petitioner,

v.

ALEX E. FERRER,

Respondent.

On Writ of Certiorari
to the Court of Appeal of California,
Second Appellate District

BRIEF OF MACY'S GROUP INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Federal Arbitration Act and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), pre-empt the holding of the California Court of Appeal in this case that voided an interstate arbitration agreement under the California Talent Agencies Act?

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STATEMENT OF INTEREST*

Amicus Macy's Group Inc. is a department store holding company whose stores include Macy's and Bloomingdale's. Formerly known as Federated Department Stores, Inc., it has had a workplace dispute resolution program in all of its divisions since 2003. Information regarding the program is provided to all employees through multiple channels. The final step of this program involves binding arbitration, although employees are given the opportunity to opt out of that final step without any negative impact on their employment. Arbitration is administered by the American Arbitration Association and allows ample discovery.

Amicus has a particular interest in this case because it has thousands of employees in California who are part of the dispute resolution program. Macy's Group therefore depends on the courts of that State properly enforcing arbitration agreements according to their terms, as the Federal Arbitration Act ("FAA") requires.

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* The parties have consented to the filing of this brief; letters of consent are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its employees, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Section 2 of the FAA establishes a strong federal policy in favor of enforcing arbitration agreements on an equal footing with other contracts, and thus requires enforcing them according to their terms. Equally well established is that that policy applies to arbitration of statutory rights and that, pursuant to the Supremacy Clause, it pre-empts any contrary state policy. Furthermore, the pre-emptive mandate of Section 2 not only bars state courts from directly voiding arbitration agreements out of hostility for arbitration but also prohibits them from piecemeal or *de facto* voiding of such agreements.

These basic propositions, reaffirmed repeatedly by this Court, are under siege in the courts of California, the decision below being just one in a long line of cases revealing hostility to arbitration involving individuals. This trend in California courts, which has been growing, is important, is openly at odds with this Court's precedents under the FAA, and merits the Court's attention in deciding this case. *Amicus* therefore, as explained more fully below, urges the Court, in reversing the decision below, broadly to reiterate the FAA's preemptive equal-footing mandate for the benefit of California courts and those who depend on the lawful enforcement of arbitration agreements in that State.

ARGUMENT

I. THE FAA AND THE SUPREMACY CLAUSE REQUIRE STATE COURTS TO PUT ARBITRATION AGREEMENTS ON "THE SAME FOOTING AS OTHER CONTRACTS," AND THEREBY PROHIBIT STATES FROM PIECEMEAL OR *DE FACTO* VOIDING OF SUCH AGREEMENTS OUT OF HOSTILITY FOR ARBITRATION.

This case is the latest in a series in which this Court has been called on to reiterate and apply the federal policy in favor of arbitration that is set out in Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2. State judicial and legislative efforts to directly void arbitration agreements threaten this policy most blatantly, but state courts and legislatures also can effectively void such agreements piecemeal or *de facto*, such as by excising portions of an agreement or, as here, piling judicial, administrative, or other costs and delays onto any arbitration. These less direct but equally corrosive efforts to undermine the federal policy also demand this Court's attention and correction.

A. Section 2 of the FAA establishes a strong federal policy in favor of enforcing arbitration agreements according to their terms, just like other contracts—a policy that applies to arbitration of statutory rights and pre-empts contrary state policy.

1. Section 2 of the FAA requires that written agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at

law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA "seeks broadly to overcome judicial hostility to" arbitration agreements. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995). It was Congress's "response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding American practice." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). Congress wanted to "change th[is] antiarbitration rule" and "overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce*, 513 U.S. at 270-71.

The Court thus has instructed that the FAA should be interpreted with this policy favoring enforcement of arbitration agreements in mind. *See id.* at 272. For example, in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), in "considering whether respondent's agreement to arbitrate [wa]s unenforceable" because it might impose prohibitive costs on a consumer, the Court did so "mindful of the FAA's purpose to reverse the longstanding judicial hostility to arbitration agreements and to place arbitration agreements upon the same footing as other contracts." *Id.* at 89 (internal quotation marks and ellipsis omitted).

This Court repeatedly has explained that, to accomplish this federal policy in favor of arbitration agreements, Congress through Section 2 directed that courts "place such agreements upon *the same footing as other contracts.*" *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989) (internal quotation marks omitted); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S.

20, 24 (1991) (FAA's purpose was "to place arbitration agreements upon the same footing as other contracts."); *Allied-Bruce*, 513 U.S. at 271 ("same footing") (internal quotation marks omitted). More recently, the Court has referred to Section 2's "equal footing" requirement. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002) (The "FAA directs courts to place arbitration agreements on equal footing with other contracts."); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) ("Section 2 . . . places arbitration agreements on equal footing with all other contracts.").

The simple but powerful rule following from Section 2's equal-footing mandate is that courts must enforce "private agreements to arbitrate . . . according to their terms," just like other contracts. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (internal quotation marks omitted); *see also, e.g., Volt*, 489 U.S. at 479 (FAA's "primary purpose" is "ensuring that private agreements to arbitrate are enforced according to their terms."); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (FAA's "basic objective" is "to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties.") (internal quotation marks and citations omitted). Thus, this Court in *Waffle House* declined to "reach a result inconsistent with the plain text of the contract," rejecting an argument that a government agency—not a party to the arbitration agreement—should not be able to do for a party what the party could not, pursuant to the agreement, do on his own. 534 U.S. at 294. And in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213

(1985), the Court held that, when a complaint raised claims that were arbitrable under the parties' arbitration agreements while other claims were not, a district court could not refuse to compel arbitration on the ground that it would produce inefficient duplication. Rather, the "preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute." *Id.* at 221.

2. Unlike a State, Congress could, as *Dean Witter* suggested, enact a "countervailing policy" that overrode in some area the FAA's mandate to rigorously enforce arbitration agreements according to their terms, on the same footing as any other contract. But the strength of the policy of the FAA is such that this Court over the last twenty-five years repeatedly has declined to find any such countervailing policy in federal statutes, and even has overruled the one earlier contrary precedent.

First, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court in an antitrust case between a foreign automaker and a domestic dealer rejected the blanket claim that, absent a clear statement in the arbitration agreement, "a court may not construe an arbitration agreement to encompass claims arising out of statutes designed to protect a class to which the party resisting arbitration belongs." *Id.* at 625. The Court could "find no warrant in" Section 2 for such a "presumption against arbitration." *Id.*

Rather, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration." *Id.* at 626-27. Absent "compelling considerations" that would provide grounds "'for the revocation of any contract,'" the FAA provided "no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability." *Id.* at 627 (quoting 9 U.S.C. § 2). That was because "agreeing to arbitrate a statutory claim" did not amount to "forgo[ing] one's substantive rights under the statute," but rather just changed the forum. *Id.* at 628. Having thus interpreted the contract at issue to provide for arbitration of claims under the Sherman Act, the Court went on to enforce the arbitration agreement, rejecting the circuit court's refusal to do so based on, among other things, the public interest in enforcement of antitrust law, concern for the dealer's having to arbitrate in Japan, the arbitration agreement's having been part of a contract of adhesion, and skepticism over the likely quality of the arbitrators. *Id.* at 629, 632-34.

Mitsubishi set a firm pattern that this Court consistently has followed. In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) ("*McMahon*"), the Court enforced an arbitration agreement between a brokerage firm and its customer that would require arbitration of claims under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act. The Court rejected the public policy considerations on which the lower courts had relied, reiterated its rejection in *Mitsubishi* of various forms of hostility to

arbitration, *id.* at 231-32, 239-40, and concluded that the terms of the agreement controlled.

Two years later, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), the Court overruled *Wilko v. Swan*, 346 U.S. 427 (1953), which had barred arbitration of certain claims under the Securities Act of 1933. *Wilko* wrongly "rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants." 490 U.S. at 481.

Two years after that, in *Gilmer*, the Court held that a claim under the federal Age Discrimination in Employment Act was subject to arbitration under an employee's arbitration agreement. The Court reiterated *Mitsubishi*'s recognition that an agreement to arbitrate a statutory claim merely changes the forum and thus "does not forgo the substantive rights." 500 U.S. at 26 (internal quotation marks omitted). The Court also rejected "a host of challenges to the adequacy of arbitration procedures" that were laced with "generalized attacks on arbitration" already rejected in *Rodriguez*. *Id.* at 30. Finally, the Court rejected an argument based on "unequal bargaining power between employers and employees," seeing no warrant under Section 2's "same footing" requirement for disregarding the agreement absent coercion, fraud, or some similar ground applicable to any contract. *Id.* at 33.

Most recently, in *Randolph*, the Court applied these cases to the question whether, even assuming Congress had no intention of requiring a judicial forum for a federal statutory claim, an arbitration agreement still could be unenforceable on the ground

that arbitration would be financially prohibitive for a party. That claimed risk was "too speculative to justify the invalidation," 531 U.S. at 91, and at odds with the "liberal federal policy favoring arbitration agreements," *id.* (internal quotation marks omitted). The Court put the burden on the party challenging the agreement to show, with evidence, that she would bear the costs and that those costs would be prohibitive for her. *Id.* at 91-92.

All of these cases were but particular applications of the FAA's broad purpose of reversing judicial hostility to arbitration agreements. *See id.* at 89-90 (summarizing). They "demonstrate that even claims arising under a statute designed to further important social policies may be arbitrated because '"so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,"' the statute serves its functions." *Id.* at 90 (quoting *Gilmer*, 500 U.S. at 28, in turn quoting *Mitsubishi*, 473 U.S. at 637; alterations in *Randolph*).

3. All the more does the federal policy in favor of arbitration apply to States, who, unlike Congress, have no authority given the Supremacy Clause to enact, apply, or enforce some contrary policy, particularly one involving hostility to arbitration. The Court first held the FAA applicable in state court in *Southland Corp. v. Keating*, 465 U.S. 1 (1984); reaffirmed this holding in *Allied-Bruce* eleven years later; and thus recently has explained that the FAA is "applicable in state courts, and pre-emptive of *state laws hostile to arbitration*," *Circuit City*, 532 U.S. at 112 (emphasis added). Thus, for example, an intention on the part of a State "to preclude a waiver of judicial remedies for [certain] statutory rights"

could not override the FAA, even though this Court in considering *federal* statutory rights does "ask whether Congress has evinced [such] an intention." *Randolph*, 531 U.S. at 90.

Indeed, *Southland* specifically contrasted the freedom of Congress, if it wished, to vary the application of the FAA for policy reasons with the lack of authority of States to do so. The state court's reliance on *Wilko* was "unpersuasive" because it overlooked this constitutional distinction. 465 U.S. at 16 n.11. In state court, even more than federal, objections to full enforcement of arbitration agreements must rest on "general contract defenses such as fraud," not on laws or policies hostile or otherwise specific to arbitration. *Id.*

And in *Circuit City*, which held that Section 1 does not exclude all employment contracts from the FAA (but rather just employment contracts involving transportation workers), the Court rejected the pleas of 21 States that such a holding "intrudes upon the policies of the separate States" in their "traditional role in regulating employment relationships." 532 U.S. at 121-22. Such was the inevitable result, under *Southland* and *Allied-Bruce*, of applying an ordinary interpretation of the text of Section 1, and did not justify distorting the law. *Id.* at 122.

B. Section 2's pre-emptive mandate prohibits state courts from piecemeal or *de facto* voiding of arbitration agreements out of hostility for arbitration, just as much as it prohibits States from directly voiding them.

The most basic violation of the FAA is to decline to enforce an arbitration agreement at all.

Thus, the Court has said, referring to the old judicial hostility, that "the basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce*, 513 U.S. at 270. Petitioner claims that California did just that in the decision below, invalidating the agreement "by inserting an administrative proceeding ahead of a decision by the Courts," Pet. 6, although Respondent disputes that claim, Opp. 4. Beyond that point, however, is the corollary that a court also can be "hostile to arbitration," *Circuit City*, 532 U.S. at 112, and "undercut the enforceability of arbitration agreements," *Southland*, 465 U.S. at 16, by piecemeal or *de facto* voiding of arbitration agreements.

The FAA prohibits indirect as well as direct means of voiding or refusing to enforce arbitration agreements. The overriding question under the FAA, particularly in reviewing actions of state courts, is whether the applicable law or rule targets arbitration agreements for treatment that is special or different from other contracts, because such arbitration-specific law "would place arbitration clauses on an unequal 'footing,' directly contrary to the [FAA's] language and Congress's intent." *Doctor's Assocs.*, 517 U.S. at 686 (internal quotation marks omitted). When a court declines fully to apply an arbitration agreement according to its terms, and does so for reasons hostile or otherwise specific to arbitration, it violates the FAA.

Allied-Bruce and *Doctor's Associates* together illustrate this point. In the former, the Court straightforwardly applied the FAA to a state statute that, equally straightforwardly, made pre-dispute arbitration agreements invalid and unenforceable.

See Allied-Bruce, 513 U.S. at 269. The Court set out a simple rule:

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful.

Id. at 281.

The next year in *Doctor's Associates*, the Court applied this rule to a Montana law that, rather than making arbitration agreements invalid, just imposed special conditions for enforcement: The first page of any contract subject to arbitration had to refer to the arbitration provision in underlined capital letters. 517 U.S. at 683. "Congress precluded states from *singling out arbitration provisions for suspect status*," yet the State had "condition[ed] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." *Id.* at 687 (emphasis added). More generally, the Court explained, quoting a treatise, prior cases stood for the rule that "state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted." *Id.* (internal quotation marks omitted). States remained

free, however, to apply general contract defenses "such as fraud, duress, or unconscionability." *Id.*

Volt illustrates the same principle. The lower court had imposed a stay of arbitration pending the resolution of related litigation, applying a state law providing for such a stay. This Court affirmed, but only by concluding that the parties in their arbitration agreement had incorporated the state law that authorized such a stay. *See* 489 U.S. at 476-77. The FAA did not pre-empt the state law, but only because the state law applied according to the terms of the agreement. The Court reiterated this understanding in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), when, drawing on *Volt*, *Allied-Bruce*, and other cases, it made clear that the FAA would pre-empt both a state law that *prohibited* the parties from including claims for punitive damages within the issues to be arbitrated, and likewise a state law that *required* the parties to include punitive damages notwithstanding the terms of their agreement. *See id.* at 58.

Mitsubishi illustrates (in a case coming from federal rather than state court) the same approach of barring special conditions on arbitration not part of the arbitration agreement. The court rejected a clear-statement rule for applying arbitration agreements to statutory rights, *see* 473 U.S. at 624-25, and also rejected an approach to enforceability that involved special skepticism for arbitration agreements that were contracts of adhesion or applied to an antitrust suit. *Id.* at 655-56. The Court thus recognized that hostility to arbitration might appear not only in a general refusal to enforce agreements but also in a willingness to enforce them

as a general matter while in particular areas declining to enforce them or imposing special requirements. The FAA bars state courts from this more selective manifestation of hostility as well: *Southland* found pre-empted a provision in a state franchise law that exempted from arbitration claims arising under that law, 465 U.S. at 5, and *Perry v. Thomas*, 482 U.S. 483, 484 (1987), held pre-empted a state law exempting wage claims from arbitration.

Perry set out in detail both the permissibility and the limits of state law under the FAA's "same footing" doctrine, and established that the doctrine applied to judge-made rules just as much as to statutory rules. The Court declined to address a question of unconscionability not decided in the courts below, but nevertheless provided directions for remand: Because under Section 2 an agreement only may be voided under general contract law, "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that *takes its meaning precisely from the fact that a contract to arbitrate is at issue*" violates Section 2. 482 U.S. at 492 n.9 (second emphasis added). A court "may not," therefore,

> in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law

> holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

Id. In other words, even though state law generally governs the interpretation of arbitration agreements just as it would any other contract, *see Volt*, 489 U.S. at 474; *Mastrobuono*, 514 U.S. at 60 n.4, that state contract law must truly be "general," rather than targeting arbitration or otherwise manifesting hostility toward it.

II. THIS COURT, IN REVERSING THE DECISION BELOW, SHOULD REITERATE THE FAA'S PRE-EMPTIVE EQUAL-FOOTING MANDATE FOR CALIFORNIA COURTS, WHICH ARE INFECTED WITH GROWING HOSTILITY TOWARD THE TERMS OF ARBITRATION AGREEMENTS INVOLVING INDIVIDUALS.

Notwithstanding the clear and repeated admonitions of this Court, based on Section 2 of the FAA, to dispense with hostility toward arbitration and to enforce arbitration agreements rigorously according to their terms, on the same footing as any other contract, the courts in California have continued to harbor and carry out a pervasive hostility to arbitration agreements involving individuals, particularly in the area of employment contracts. That open hostility undermines this Court's precedents, creates harmful uncertainty for those with such agreements in that major State, and merits the Court's attention in this case.

A. This Court repeatedly has had to check the hostility of California courts toward arbitration involving individuals.

The present case is the latest in a long line coming to this Court out of California, and is not unusual in the starkness of its disregard of the FAA and this Court's precedents. In February 2006, this Court in *Buckeye Check Cashing* held that Section 2, together with the rule that arbitrators decide the validity of contracts subject to arbitration (as distinct from the validity of arbitration agreements), barred a State from refusing to compel arbitration on the ground that a loan contract containing an arbitration agreement was illegal and even criminal under various state lending and consumer-protection laws. *See* 546 U.S. at 443, 445-46. The Court directly rejected the Florida Supreme Court's reliance on state public policy and explained that *Southland* "rejected the proposition that the enforceability of the arbitration agreement turned on the state legislature's judgment concerning the forum for enforcement of the state-law cause of action." *Id.* at 447. Barely nine months later, a divided panel of the California Court of Appeal, in the decision below, affirmed a trial court ruling declining to enforce an arbitration agreement and instead interpreting a state statute as requiring initial resort to a state administrative forum. *Ferrer v. Preston*, 145 Cal. App. 4th 440, 444-46 (2006). In a single paragraph, the Court of Appeal summarily disregarded *Buckeye Check Cashing* on its facts, as well as the dissent's arguments based on the case, ignoring the broad basis of the decision. *Id.* at 447.

This approach continues a pattern that stretches back at least to *Southland*, one of the two primary authorities on which *Buckeye Check Cashing* relied. The California Supreme Court in *Southland* had held that the California Franchise Investment Law, in barring any "waive[r]" by individual franchisees of "compliance with any provision of" that law, required judicial consideration of claims and thus barred enforcement of an agreement to arbitrate them. 465 U.S. at 10 (internal quotation marks omitted). This Court saw "nothing in the Act indicating that the broad principle of enforceability is subject to any . . . limitations under State law" beyond those that Section 2 indicated. *Id.* at 11. It thus held that the state law violated the Supremacy Clause, and explained that in the FAA "Congress intended to foreclose any state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 16. Under Section 2, States only may use "general contract defenses such as fraud to avoid enforcement of an arbitration agreement," yet the California law did not involve such a defense. While Congress might provide for such a defense to arbitration as the franchise law set out, California could not. *Id.* at 16 n.11.

Three years later in *Perry*, this Court again corrected the California courts' open refusal to follow the FAA. A provision of the California Labor Code provided that lawsuits to collect wages could be maintained "without regard to the existence of any private agreement to arbitrate." 482 U.S. at 484 (internal quotation marks omitted). The trial court, applying it, had denied a petition to compel

arbitration of an employee's breach-of-contract claim. The Court of Appeal affirmed in an unpublished opinion, and the California Supreme Court denied review. *Id.* at 488-89. In holding that the FAA pre-empted the state provision, this Court began with this broad admonition: "'Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.'" *Id.* at 489 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The Court also reiterated *Southland*'s rejection of any state-law limitation on enforceability of an arbitration agreements apart from those that Section 2 indicated, as well as its concluding explanation that the FAA "'intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.'" *Id.* at 489-90 (quoting *Southland*, 465 U.S. at 11 & 16, respectively). And the Court emphasized the mandate, as set out in *McMahon*, to rigorously enforce arbitration agreements. *Id.* at 490. The California law was "in unmistakable conflict" with the "clear federal policy." *Id.* at 491.

Volt did, in a suit between a university and a construction company, affirm a decision of the California Supreme Court applying California's statutory arbitration procedures, including a stay of arbitration. But, as explained above, this Court did so only on the theory that the parties had, by agreeing to apply California law, agreed to apply California's arbitration statute. 489 U.S. at 476. The Court thus emphasized not any deference to state law or particular arbitration procedures, but rather the basic federal policy under Section 2 of "ensur[ing] the

enforceability, according to their terms, of private agreements to arbitrate." *Id.*; *see id.* at 478 (similar). *Southland* and *Perry*, the Court explained, did not establish that the FAA "prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself," but rather were, just like the decision in *Volt* itself, manifestations of "the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms," including terms that "specify by contract the rules under which that arbitration will be conducted." *Id.* at 479. Furthermore, the Court in *Mastrobuono* indicated that it considered the California Supreme Court's interpretation of the parties' agreement in *Volt*, to incorporate state arbitration procedure, as at the outer edge of plausibility. *See* 514 U.S. at 60 n.4.

Finally, *Circuit City*, although coming to this Court from California federal rather than state court, involved a similar scenario to *Southland* and *Perry*. After all eight circuits to consider the question had held that Section 1 of the FAA excluded from the FAA's coverage only employment contracts of transportation workers, the Ninth Circuit held that Section 1 excluded *all* employment contracts. 532 U.S. at 110-11. In a case involving an employment contract of a Circuit City employee in California, this Court reversed the Ninth Circuit. The Court pointedly opened by noting that "[a]ll but one of the Courts of Appeals which have addressed the issue" agreed with the Court's interpretation of Section 1. *Id.* at 109. The Court reiterated that the FAA was "pre-emptive of state laws hostile to arbitration," *id.* at 112, and concluded by specially rejecting the plea

of 21 States to follow the Ninth Circuit's reading. *Id.* at 121-22. Citing *Gilmer*, the Court explained, "We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Id.* at 123.

B. The decision below is part of a series of recent California decisions revealing more explicit hostility to arbitration involving individuals.

The hostility of California courts to arbitration involving individuals, and to this Court's holdings and admonitions under the FAA, has been hardly limited to the cursory dismissal of the FAA and *Buckeye Check Cashing* by the court below. Rather, it appears persistently in a series of recent decisions by the California Supreme Court, most notably *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007); *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005); and *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000). Each imposes, in disregard of the FAA's rule to rigorously enforce arbitration agreements according to their terms, yet another restriction on the ability of companies to enforce their arbitration agreements in California courts as written. The California courts are methodically whittling away at arbitration, erecting barriers to enforcement piecemeal, with the *de facto* result of making them at least practically unenforceable—contrary to Section 2, the Supremacy Clause, and this Court's precedents.

Gentry involved a claim for overtime pay pursuant to the California Labor Code, the same code at issue in *Perry*, by a former employee of Circuit City who claimed that Circuit City had misclassified

certain employees as exempt from the minimum wage. The plaintiff had, in commencing his employment, declined to opt out of an arbitration agreement that barred class arbitration, and the question was whether the waiver on class arbitration was enforceable. *See Gentry*, 42 Cal. 4th at 451. Somewhat as in *Southland* (involving an unwaivable statutory right of a franchisee), the California Supreme Court explained that "the rights to the legal minimum wage and legal overtime compensation conferred by the statute are unwaivable," that the legislature intended that "minimum wage and overtime laws should be enforced in part by private action brought by aggrieved employees," and that "overtime legislation" had great "public importance." *Id.* at 455-56 (internal quotation marks omitted). The court also pointed to a portion of the Civil Code setting out a public policy against contracts that "exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent." *Id.* at 453-54 (internal quotation marks omitted).

The court announced the general rule that "a class arbitration waiver" could "lead to a de facto waiver and would impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws." *Id.* at 457.[1] In fact, a class arbitration waiver could have such effect "at

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[1] The term "class arbitration waiver" was used by the California Supreme Court to describe any provision in an arbitration agreement that required individual-specific arbitration of a dispute rather than class or consolidated claims.

least frequently if not invariably." *Id.* A court should "invalidate the class arbitration waiver" if it determined, based on four factors, "that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration" and "that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected." *Id.* at 463. In practice, invalidation will be the rule, as the court merely declined to "foreclose the possibility" that some waivers in arbitration agreements could be enforced. *Id.* at 464. The court remanded for the trial court to apply this new rule, *id.* at 466, while acknowledging that, in light of it, Circuit City might no longer desire arbitration, *id.* at 467. In a separate part of the opinion, the *Gentry* court went on to pave the way for striking down as unconscionable any class-arbitration waiver that survived this gauntlet. *See id.* at 470-73.

Discover Bank was a primary authority for *Gentry*, and the California Supreme Court there effectively excised class arbitration waivers from arbitration agreements in consumer contracts. The plaintiff sought a class action against his credit card company for allegedly defrauding a large number of customers of small amounts of money. *Discover Bank*, 36 Cal. 4th at 154. The credit card company had used a "bill stuffer" to amend its agreement with customers to require arbitration of all disputes and prohibit class arbitration. The court found such agreements generally unconscionable and thus unenforceable, emphasizing state policies in favor of

class actions and class arbitrations in consumer actions. *See id.* at 156. In particular, such agreements amounted to exculpatory contract clauses in violation of the state Civil Code, at least when (1) the waiver was in a consumer contract of adhesion, (2) involving disputes likely to involve small amounts of damages, and (3) the plaintiff alleged "that the party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Id.* at 162-63.

Gentry also relied on *Armendariz*, which itself had imposed four preconditions for the enforcement of any pre-dispute agreement to arbitrate unwaivable statutory employment rights: (1) The arbitration agreement may not limit the damages normally available under the statute; (2) there must be discovery sufficient to adequately arbitrate the statutory claim; (3) there must be a written arbitration decision and judicial review, sufficient to ensure that the arbitrators comply with the statute, and (4) the employer must pay all types of costs that are unique to arbitration. *See Armendariz*, 24 Cal. 4th at 103, 106, 113; *see also Gentry*, 42 Cal. 4th at 456-57 (summarizing *Armendariz*). *Gentry* generally described *Armendariz* as "mak[ing] clear that for public policy reasons we will not enforce provisions contained within arbitration agreements that pose significant obstacles to the vindication of employees' statutory rights." *Gentry*, 42 Cal. 4th at 463 n.7.

Three years after *Armendariz*, the California court held unconscionable, in a suit for termination of employment in violation of public policy, "a provision in a mandatory employment arbitration agreement

that permits either party to 'appeal' an arbitration award of more than $50,000"; imposed on the remaining provisions of the arbitration agreement the four "minimum requirements for arbitration of unwaivable statutory claims" set out in *Armendariz*, and reaffirmed the final categorical requirement, regarding costs, notwithstanding this Court's intervening decision in *Randolph* that prohibitive costs must be shown, not just asserted. *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1068-69, 1084-85 (2003).

C. This trend in the California courts is important, is openly at odds with this Court's precedents under the FAA, and merits the Court's attention in deciding this case.

In these recent California cases, including the decision below, the California courts either waved aside substantial objections based on the FAA or employed reasoning whose hostility to arbitration is indistinguishable from that which this Court has rejected in the line of cases beginning with *Mitsubishi*, or both. What the California courts did *not* do was put arbitration agreements on the same footing as other contracts and enforce them rigorously according to their terms.

This pervasive judicial hostility against arbitration involving individuals, against the FAA, and against this Court's precedents is not hidden, and it merits this Court's attention. In reversing the California Court of Appeal here, the Court should not just narrowly enforce *Buckeye Check Cashing*, but rather should more broadly reiterate and expound for the California courts, and those (such as *amicus*) with arbitration agreements in the Nation's most

populous State and largest economy, the full requirements of the FAA as set out above in Part I. *Cf. Circuit City*, 532 U.S. at 123 (rejecting proposed interpretation of FAA because, among other things, it "would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's proarbitration purposes" and breeding litigation).

1. Most notable among the cases showing open hostility is *Gentry*, which effectively excised prohibitions on class arbitration from arbitration agreements in employment contracts. The majority in the 4-3 decision consigned most of its discussion of the FAA to a footnote and criticized the dissent for "its preference that in this case the [*federal*] statutory policy in favor of enforcing arbitration agreements as written overrides the [*state*] statutory policy in favor of vigorously enforcing overtime laws." *Gentry*, 42 Cal. 4th at 465 n.8. This preference was not one that the California "Legislature shared or shares," nor had the Legislature "favored the arbitration of wage and overtime claims at all." *Id.* The court invoked state policy from the 1960s, *Wilko*, and a law review article arguing that Congress in enacting the FAA did not imagine its applying to "compel arbitration of statutory wage claims." *Id.* The court did briefly acknowledge that *Perry* had held the FAA pre-empted a California law barring arbitration of wage disputes, and cited *Rodriguez*, which overturned *Wilko*. *Id.* But neither concession caused the court to pause in concluding—based on *Armendariz* rather than any decision of this Court—that the FAA permits what the court called

"arbitration-neutral rules that limit enforcement of specific provisions of arbitration agreements on public policy grounds." *Id.* Yet *Armendariz* expressly set out—as *Gentry* recognized elsewhere, *id.* at 456—a set of arbitration-*specific* requirements for arbitration agreements in employment contracts. *See Armendariz*, 24 Cal. 4th at 90-91 (describing "certain minimum requirements" that an "arbitration must meet" to enable an employee to vindicate his statutory rights).

The dissenting justices in *Gentry* thus marveled that, "as the majority implicitly concedes," its authorities for legislative hostility to arbitration of wage claims all "have been *superseded or invalidated* by the prevailing public policy that *favors* enforcement of arbitration agreements according to their terms." *Gentry*, 42 Cal. 4th at 477 n.3 (Baxter, J., dissenting).

Similarly, in *Discover Bank* the California Supreme Court reversed a unanimous decision of a California Court of Appeal panel that had upheld a class action waiver in an arbitration agreement and found the FAA to "preempt[ ] a state court from applying state substantive law to strike the class action waiver from the agreement." *Discover Bank v. Superior Court*, 105 Cal. Rptr. 2d 393, 396 (Ct. App. 2003). California's public policy against class action waivers had to submit, the intermediate court reasoned, to the federal policy of enforcing arbitration agreements according to their terms. *Id.* at 403. The Court of Appeal relied on *Doctor's Associates*, the primary case in which this Court has rejected state efforts to add terms to and conditions for the

enforcement of arbitration agreements, as well as *Southland* and *Perry*. *See id.* at 404-05, 407-09.

2. The California courts' methodical superimposing of requirements or exceptions onto arbitration agreements based on state policy concerns clashes with this Court's repeated refusals to do the same when considering other *federal* laws under the FAA, as described above in Part I.A. The "generalized attacks on arbitration" by the California courts are the same ones that this Court has "already rejected," repeatedly. *Gilmer*, 500 U.S. at 30.

In *Armendariz* and *Gentry*, the California Supreme Court required "sufficient" discovery in any employment arbitration; yet in *Gilmer* this Court rejected an attack on arbitration of a federal claim of age discrimination in employment as involving overly limited discovery, *Gilmer*, 500 U.S. at 31, and in *Circuit City* this Court observed that arbitration's informality (such as reduced discovery) allows "parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts," 532 U.S. at 123. In *Armendariz* and *Gentry*, the California Supreme Court required that arbitrators issue a written decision; yet in *Gilmer* this Court rejected the attack that "arbitrators often will not issue written opinions," thereby depriving the public of knowledge of employment discrimination, because, among other things, judicial decisions would continue to illuminate the law and discrimination, and this concern applied equally to settlements. 500 U.S. at 31-32. In *Armendariz* and *Gentry*, the California Supreme Court outlawed

employment arbitration agreements that limit statutorily available damages; yet in *Mastrobuono* this Court indicated that the FAA leaves parties free to determine whether or not to allow punitive damages. And in *Armendariz* and *Gentry*, the California Supreme Court required the employer to pay all costs that are unique to arbitration, whereas this Court in *Randolph* refused to presume that arbitration costs would be prohibitive so as to void an arbitration agreement, and *Circuit City* recognized that arbitration can "avoid the costs of litigation," 532 U.S. at 123.

More broadly, the reasoning of California courts, in devising ways to constrain agreements by individual employees or consumers to arbitrate disputes, is suffused with "'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.'" *Gilmer*, 500 U.S. at 30 (quoting *Rodriguez*, 490 U.S. at 481). Yet that is the very suspicion that this Court repeatedly has rejected as barred by the FAA. As explained recently in *Circuit City*: "We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. . . . [and] quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection." 532 U.S. at 123. All the more, for reasons already explained, do these propositions apply to state enactments subject to pre-emption by the FAA. *See id.* at 124.

If the encumbrances laden on arbitration by the California courts had been imposed by the state

legislature, it would be plain that the State had targeted and acted out of hostility for arbitration, and that the FAA pre-empted them. That instead the courts imposed them (usually through broad or creative applications of state statutes) makes no difference. As *Perry* recognized, Congress did "intend[ ] to foreclose state legislative attempts to undercut the enforceability of arbitration agreements," 482 U.S. at 489, but that does not mean that a court may "effect" what "the state legislature cannot," *id.* at 492 n.9.

Furthermore, California is attempting to draw to itself a policy-based power that, as this Court highlighted as early as *Southland*, 465 U.S. at 16 n.11, it does not and cannot have, one that belongs only to Congress. In this, its courts directly threaten this Court's FAA jurisprudence of the last twenty-five years. They are undercutting by degrees the enforceability of arbitration agreements involving individuals, such as in consumer and employment contracts, thereby effectively overruling this Court's decisions in *Circuit City*, *Perry*, and other cases, and warring with the reasoning of cases in the line of *Mitsubishi*. Such hostility toward precedent and federal law warrants a response from this Court, and the instant case provides a good opportunity to do so.

3. Fortunately, the grounds on which this Court could check that hostility are well established, in *Mitsubishi* and subsequent cases, as well as in the general requirements of the FAA to put arbitration agreements on an equal footing with other contracts and enforce them according to their terms. This Court's reasoning in *Rodriguez* in overturning *Wilko* may be the most instructive and applicable: The

California courts' "characterization of the arbitration process" has been "pervaded by . . . the old judicial hostility to arbitration." 490 U.S. at 480 (internal quotation marks omitted). Yet "[t]hat view has been steadily eroded over the years," particularly since *Mitsubishi*. *Id.* "To the extent that" the California courts' decisions "rest[ ] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, [they have] fallen far out of step with [the Court's] current strong endorsement favoring this method of resolving disputes." *Id.*; *see also Circuit City*, 532 U.S. at 123 (discussing advantages of arbitration in employment context and its consistency with statutes protecting employees); *Randolph*, 531 U.S. at 90 (similar holding regarding "statute[s] designed to further important social policies"; refusing to indulge speculative risk that costs of arbitration would be prohibitive to consumer and preclude effectively vindicating statutory rights).

The California courts have indeed fallen far out of step with this Court, the decision below being but one small misstep in that waywardness. In correcting that particular misstep, the Court should seek more broadly to get the California courts back in step with its own precedents, the FAA, and the Supremacy Clause.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges the Court broadly to reverse the decision below.

Respectfully submitted,

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ARNOLD M. PRESTON,

Petitioner,

v.

ALEX E. FERRER,

Respondent.

On Writ of Certiorari to the California Court of Appeal for the Second Appellate District

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. The Federal Arbitration Act (FAA) requires that disputes over the validity of a contract which includes an arbitration clause must be brought in the first instance before the arbitrator. *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440 (2006). Such disputes may not be brought in the first instance before a state court, even where the dispute is over the validity of the whole contract. *Id.* at 446. Does the same preemption rule bar review by state administrative agencies as well as by state courts?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petitioner.[1]

PLF was founded more than 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for the resolution of disputes between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act and freedom of contract in general, including *Hall Street Associates, L.C.C. v. Mattel, Inc.*, No. 06-989 (U.S. filed Jan. 12, 2007) (pending); *Cingular Wireless, LLC v. Mendoza*, 126 S. Ct. 2353 (2006); *Grafton Partners L.P. v. Superior Court*, 116 P.3d 479 (Cal. 2005); and *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007). PLF believes its public policy experience will assist this Court in its consideration of the merits of this case.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

This case requires a simple extension of *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). In that case, the Court held that the Federal Arbitration Act (FAA) requires disputes over the validity of a contract to be brought before the arbitrator, and not in state court (except where the dispute concerns the validity of the arbitration provision itself). Here, the question is whether disputes over the validity of a contract may be brought before a state administrative agency, or whether the authority of such agencies, like the authority of state courts, is preempted by the FAA. The answer is yes: administrative agencies—in this case, the California Labor Commission—act in many instances like state courts in determining the validity of contracts. To create a loophole in the *Buckeye* rationale that allows parties to escape their arbitration agreements simply by seeking review before administrative agencies would undermine the policy of the FAA, which is to require parties to abide by their agreements. That policy is rooted fundamentally in the freedom of contract—an essential principle of the American economy which must be upheld in this case.

ARGUMENT

I

THE FAA'S BASIC POLICY OF ENFORCING PARTIES' AGREEMENTS TO ARBITRATE WOULD BE UNDERMINED BY ALLOWING PARTIES TO CHALLENGE THE VALIDITY OF THE CONTRACT IN NON-ARBITRAL SETTINGS

The FAA was designed to guarantee the enforcement of contracts that call for arbitration, and to preempt state laws or common law that limited the enforceability of arbitration. Prior to the enactment of the FAA, some state courts had determined that they lacked power to order parties to abide by arbitration clauses. *See Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984) (opinion of Stevens, J.). Even if the parties had agreed before the dispute arose that they would settle their disagreements through arbitration, one or the other party could later file a lawsuit in court, and the court would refuse to stay the proceedings pending arbitration or force the parties to submit to the arbitration as agreed. Breach of an arbitration agreement was thus effectively insulated from judicial review.

The American Bar Association responded to this problem by drafting federal legislation that incorporated arbitration into the federal judicial system, allowing disputes to be resolved by arbitration first, and then allowing those arbitration decisions to be confirmed by the federal courts. Congress adopted the Bar Association's proposal in the FAA. Arbitration agreements, Congress declared, "are purely matters of

contract, and the effect of the [FAA] is simply to make the contracting party live up to his agreement . . . . An arbitration agreement is placed upon the same footing as other contracts, where it belongs." H.R. Rep. No. 96, 68th Cong., 1st Sess. at 1 (1924). *See also* Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 Notre Dame L. Rev. 101, 149 (2002) (quoting Rep. Graham):

> [t]his bill simply provides for one thing, and that is to give an opportunity to enforce an agreement . . . to arbitrate, when voluntarily placed in the document by the parties . . . . It does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to give enforcement to that which they have already agreed to.

See also Wharton Poor, *Arbitration Under the Federal Statute*, 36 Yale L. J. 667, 677 (1927) ("The principle of arbitration is, in substance, no more than allowing the parties to select and pay their own arbiter rather than to have one thrust upon them by the government.").

The Congress that enacted the FAA was motivated primarily by a concern for enforcing the contractual agreements of the parties, and the Court has repeatedly found that the FAA was designed "first and foremost . . . to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985). *See also Moses H. Cone*

Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (recognizing "liberal federal policy favoring arbitration agreements").

The primary policy behind the FAA, therefore, is rooted in freedom of contract: to ensure that the agreements that parties make will ultimately be enforced. This freedom is effected by strictly enforcing agreements even where parties later regret the bargains they have made. As Professor Stephen J. Ware has noted, one of the primary benefits of arbitration is to ensure that a dispute-resolution mechanism is created prior to a dispute: "the social gains resulting from arbitration's lower process costs will not be realized nearly as often if an enforceable arbitration agreement can only be made after a dispute arises. Neither party is likely to agree, post-dispute, to arbitrate claims for which arbitration is expected to be less favorable to that party than litigation would be." Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 263 (2006). Enforcing arbitration agreements is nothing more than respecting the decisions the parties have made and were authorized to make. Allowing a party to escape his arbitration agreement imposes costs on the other party—costs that the other party consciously tried to avoid by negotiating and making an agreement.

Arbitration is widely recognized as cheaper and more efficient than judicial review. *See, e.g.*, Thomas S. Meriwether, *Limiting Judicial Review of Arbitral Awards Under the Federal Arbitration Act: Striking the Right Balance*, 44 Hous. L. Rev. 739, 758 (2007) ("Parties opt for arbitration in lieu of traditional

litigation in large part because arbitration offers a quicker and less expensive avenue for dispute resolution."). Parties who execute an arbitration agreement have thus made a bargain based on their costs and benefits. But more importantly, arbitration is a matter of freedom of choice, and this Court has recognized that the purpose of the FAA is not primarily to promote efficiency but to give effect to the parties' freedom of choice. *See Byrd*, 470 U.S. at 219-20. Unforseen alterations to any contract—such as allowing a party to back out of his agreement to arbitrate—both increases inefficiency and fails to protect the parties' freedom of choice. As this Court put it in *Baltimore & Ohio Sw. Ry. Co. v. Voigt*, 176 U.S. 498, 505 (1900), "the right of private contract is no small part of the liberty of the citizen, and . . . the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation."

II

THE RATIONALE OF *BUCKEYE* SHOULD APPLY TO ADMINISTRATIVE AGENCIES AS WELL AS TO STATE COURTS

A. *Buckeye* Correctly Found That Litigants May Not Avoid Arbitration by Challenging the Contract as a Whole in State Courts

Contractual disputes, of course, will frequently be disputes over the validity, *vel non*, of the contract itself. An arbitrator is therefore frequently called upon to determine whether the contract itself is or is not validly formed and signed. To allow parties to evade

the arbitration agreement in any case where they challenge the validity of the contract itself would be to allow the parties to escape the arbitration that Congress specifically chose to enforce. Assuming the arbitration provision itself is valid, parties to a contract should not be able to escape their obligation to resolve disputes by arbitration by adding to their dispute a challenge to the validity of the contract as a whole and bringing that dispute in state court.

In *Buckeye Check Cashing*, this Court determined that where parties do not challenge the arbitration provision itself, but instead claim that the entire contract is void, the agreement to arbitrate is still enforceable, and the question of the contract's legality should "be considered by the arbitrator in the first instance." 546 U.S. at 446. This holding was based on the fact that the arbitration provision is a separate promise, severable from the rest of the contract's terms. *Id.* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)). Thus, enforcing the agreement to arbitrate—which was the FAA's goal—requires parties to abide by that agreement unless the arbitration provision itself is invalid. *Id.* at 445-46.

Moreover, allowing a party to evade the arbitration requirement by alleging a contract as a whole to be void would do significant damage to the FAA's policy of requiring parties to abide by their arbitration agreements. A party could allege a contract to be invalid, go to state court, and thereby "deny effect to an arbitration provision in a contract that the court finds to be perfectly enforceable." *Id.* at 448-49. In short, Congress intended, when enacting the FAA, to enforce the promises of parties who choose

to arbitrate so long as those promises themselves are valid, and to "withdraw the power of the states to require a judicial forum for the resolution of claims by which the contracting parties agreed to resolve by arbitration." *Southland Corp.*, 465 U.S. at 10. Assuming that the contract at issue falls within Congress' commerce power and the jurisdictional element included in the statute, *id.* at 11, a valid arbitration agreement in a contract is subject to enforcement even where the other terms of that contract, or its validity as a whole, are in dispute.[2]

The *Buckeye* decision was premised on the notion that the FAA's goal was to ensure nationwide enforcement of arbitration clauses in contracts. *See Byrd*, 470 U.S. at 219-20 (Congress' purpose in enacting the FAA was "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate.").

> State court attempts to undercut the enforceability of arbitration agreements, such as that of the Florida Supreme Court in *Buckeye*, are just as detrimental to the uniform enforcement of arbitration agreements as was the federal "rule of equity" that prompted the passage of the FAA in the first place, or the anti-arbitration state legislation at issue in *Southland*.

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[2] These parties have not argued that this case involves wholly intra-state commerce, or addressed whether applying the FAA would be constitutional under such circumstances. *Cf. Jones v. United States*, 529 U.S. 848 (2000). Nor have the parties asked for the overruling of *Southland*'s conclusion that section 2 is applicable in state courts. *Cf. Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 284 (1995) (Scalia, J., dissenting).

Kirsten Weisenberger, *From Hostility to Harmony: Buckeye Marks a Milestone in the Acceptance of Arbitration in American Jurisprudence*, 16 Am. Rev. Int'l Arb. 551, 566 (2005). The FAA's preemption rule bars state courts from interceding in contracts that are subject to arbitration.

B. State Administrative Agencies Often Operate Essentially Like Courts in Reviewing Contract Disputes

The FAA was enacted at a time when the modern administrative state was still in its infancy. *See* G. Edward White, *The Constitution and the New Deal* 94-103 (2000). At that time, contracting parties who had a dispute were most likely to have that dispute heard before a state court. The FAA required parties to abide by their arbitration agreements instead of proceeding in state court. A modern administrative agency, however, frequently "acts as a legislative agency . . . [and] as an agency of the judiciary," *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935), and contract disputes today frequently are addressed by administrative agencies which exercise this mixture of powers. Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. Tex. L. Rev. 191, 195 (2005) ("Administrative agencies and commissions have thousands of employees resolving disputes about taxes, contracts, employment, construction, on-the-job injuries, and a host of other claims that were once tried to juries.").

Contractual review by administrative agencies has significant costs that would justify contracting parties' choice of arbitration over administrative review. "We know that administrative procedures, even the most informal are not cost-free. Professional

time is expensive, and the demands for it escalate rapidly as we move to ever more judicialized, adversary-type proceedings. Delay, too, is expensive . . . ." Judge Loren A. Smith, *Administrative Conference of the United States, 1981 Report* 2-3 (1981) (chairman's foreword), *cited in* Carl McGowan, *A Reply to Judicialization*, 1986 Duke L.J. 217, 229 n.68 (1986). At the federal level, the costs of administrative proceedings are so large that the Administrative Conference of the United States has recommended that agencies employ alternative dispute resolution, including arbitration:

> Federal agencies now decide hundreds of thousands of cases annually—far more than do federal courts. The formality, costs and delays incurred in administrative proceedings have steadily increased, and in some cases now approach those of courts. Many agencies act pursuant to procedures that waste litigants' time and society's resources and whose formality can reduce the chances for consensual resolution. The recent trend toward elaborate procedures has in many cases imposed safeguards whose transaction costs, to agencies and the public in general, can substantially outweigh their benefits.

Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure (citing 1 C.F.R. § 305.86-3 (1986)), *reprinted at* 51 Fed. Reg. 25,641-01. The state of California similarly offers participants in administrative adjudications the option of proceeding via arbitration or other forms of alternative dispute resolution as a means of reducing

costs. *See* Cal. Code Regs. tit. 1, § 1202 ("The purpose of Alternative Dispute (ADR) is to provide *a less expensive* and more satisfying alternative to administrative adjudication without diminishing the quality of justice or the parties' right to a hearing." (emphasis added)).

Moreover, "[t]he use of administrative courts is not without its concerns, [including] . . . [a]gency 'capture.' " Carl N. Pickerill, *Note: Specialized Adjudication in an Administrative Forum: Bridging the Gap Between Public and Private Law*, 82 Notre Dame L. Rev. 1605, 1633-34 (2007). Agency capture is "the concept in political science literature that administrative agencies tend to develop biases toward their own regulatory clients." Joel P. Trachtman & Philip M. Moremen, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?*, 44 Harv. Int'l L.J. 221, 240 (2003). Administrative agencies are likely to make decisions that will protect agency authority or promote other agency interests at the expense of the parties themselves. In fact, the legitimacy of the modern delegation of power to administrative agencies has been upheld in large part because the ultimate availability of judicial review is thought to prevent this kind of abuse in its worst instances. W. Michael Gillette, *Administrative Law Judges, Judicial Independence, and Judicial Review: Qui Custodiet Ipsos Custodes?*, 20 J. Nat'l Ass'n Admin. L. Judges 95, 101 (2000) ("[T]he need for judicial review is that it is a normal human response to being granted power to use that power to the fullest extent to which the power exists and (perhaps) a little beyond.").

Academic criticisms of private arbitration have often been predicated on the argument that arbitration offers an unequal forum that might benefit the wealthy and experienced at the expense of less influential parties, and that such proceedings may not offer the same procedural protections as traditional law courts. *See, e.g.*, Ann C. Hodges, *Dispute Resolution Under the Americans with Disabilities Act: A Report to the Administrative Conference of the United States*, 9 Admin. L.J. Am. U. 1007, 1097-98 (1996). But administrative agency hearings may also be unequal, expensive, informal, inefficient, or biased. *See, e.g.*, *Withrow v. Larkin*, 421 U.S. 35, 51 (1975) (concerns about administrative bias and inefficiency are "substantial . . . [and] not new . . . . Indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly unlikely."). Private parties may legitimately worry that review by an administrative agency may not serve their needs. These parties should be free to agree to some other forum for dispute resolution, and to decide for themselves whether review by an arbitrator would be more effective, fair, and efficient. "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989).

C. The FAA Precludes Review of a Contract's Validity by a State Administrative Agency

This Court has frequently found the authority of administrative agencies to be preempted by the FAA.

See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28-29 (1991) ("[T]he mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration."); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 231 (1987) (requiring arbitration of disputes subject to jurisdiction of the Securities and Exchange Commission); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 479-80 (1989) (same). In *Gilmer*, the Court held that while claims under the Age Discrimination in Employment Act are subject to review by the Equal Employment Opportunity Commission, arbitration agreements must nevertheless be enforced by bringing contractual disputes before the arbitrator, and not the Commission. 500 U.S. at 29.

Olde Discount Corp. v. Tupman, 1 F.3d 202 (3d Cir. 1993), *cert. denied sub nom. Hubbard v. Olde Discount Corp.*, 510 U.S. 1065 (1994), is one of the very few decisions to address the question presented in this case. There, the Third Circuit reviewed a case in which parties to a securities agreement fell into dispute which would otherwise have fallen under the jurisdiction of an administrative agency. The purchasers of the securities brought their dispute to the attention of the Delaware Division of Securities, *id.* at 204, and the Division began an investigation. When negotiations over the dispute failed, the seller sought to pursue arbitration in compliance with the securities contract. *Id.* at 205. The state, however, issued a notice that the seller would be subject to a hearing before the state securities commissioner. *Id.* The court found that the FAA required the parties to submit to arbitration, and not to state administrative review. "[I]f the Delaware securities commissioner pursues

rescission in the administrative proceeding," the court noted, the seller's "federal right to arbitration would be impaired, as the merits of the claim that the arbitration agreement reserves for an arbitral forum will be resolved administratively." *Id.* at 207.

The court noted that the FAA's "fundamental purpose [was] . . . to create 'a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.'" *Id.* at 209 (quoting *Moses H. Cone*, 460 U.S. at 24). The court found that there was an actual conflict between the Delaware administrative mechanism for dispute resolution and the FAA, because the administrative remedy made it impossible to comply with the arbitration agreement, and because the state law served as an obstacle to the purposes of the FAA. *Id.* at 207. The administrative remedy would "adjudicate administratively the very same questions . . . that the [buyers] themselves could pursue only within an arbitration. In that regard, Delaware has interfered with [the seller's] right under the FAA to resolution of these issues through arbitration." *Id.* Thus the FAA precluded adjudication of the validity of the contract through administrative proceedings. *Accord, Dexter v. Prudential Ins. Co. of Am.*, No. 99-3137, 2000 WL 728821, at *3 (10th Cir. June 7, 2000) ("Clearly it was not contemplated that participation in administrative proceedings would operate to waive a contractual right to arbitration."); *Cf. Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470, 474-75 (5th Cir. 2002) (FAA requires arbitration of disputes that would otherwise be reviewed by Federal Trade Commission, and therefore notice to the Commission is not required as it would be if parties sought review in court instead); *Davis v. O'Melveny &*

Myers, 485 F.3d 1066, 1082 (9th Cir. 2007) (dictum that "[a]rbitration is favored as a matter of policy regardless of whether it is in lieu of a judicial or administrative forum."). *Olde Discount* and these other decisions rightly recognize that the remedies available in administrative proceedings are not relevantly different from those available in judicial proceedings, and therefore that the FAA's goal of enforcing arbitration agreements should prevail even where the dispute is otherwise entrusted by state law to an administrative agency.

The analysis applied in *Olde Discount* applies with equal force to this case. There, the court pointed out that it was impossible to comply with both the administrative mechanism and the arbitration agreement, because the claims asserted before the administrative agency were the same as the claims that would have been raised before the arbitrator. 1 F.3d at 208 ("[T]he claims that the Delaware Division of Securities is pursuing . . . certainly would be subject to arbitration if pursued by the [buyers] themselves.").[3] This is also the case here: Ferrer's claim that the contract is invalid would be presented in both the administrative hearing and arbitration. Likewise, the *Olde Discount* court noted that "in any practical sense,

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[3] Although this Court found in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), that the FAA did not preclude the resolution of a dispute by the Equal Employment Opportunity Commission, the EEOC in that case was pursuing its own remedy as a party in itself. The EEOC "[did] not stand in the employee's shoes" in that case, *id.* at 297. *Waffle House*, therefore, did not abrogate *Olde Discount* and does not apply to this case. The administrative agency in this case acts not as a prosecutor, or as an independent party, but only as a judicial forum to determine the validity of a contractual dispute between private parties. *Id.* at 294.

[the security seller] cannot simultaneously arbitrate its claims against the [buyers] and defend against the Delaware securities commissioner's pursuit of the rescission remedy in an administrative proceeding." *Id.* at 209. Although "in a physical sense [the seller] could be represented in two proceedings at once, the potential for actual conflict in that scenario is manifest," because if the arbitrator found that the buyer's claims were without merit, while the administrative agency affirmed them, "the results of the proceedings will be irreconcilable." *Id.* The same is true in this case: if the Labor Commissioner finds the contract invalid, the finding would be irreconcilable with an arbitrator's determination that it is valid. It is therefore "impossible to give effect to both the administrative . . . remedy and the federal right to arbitration." *Id.*

D. *Buckeye* Should Control This Case

Given that the FAA precludes initial review by a *federal* administrative agency, a straightforward application of the rationale of *Buckeye Check Cashing* and *Prima Paint* foreclose state attempts to interfere with arbitration by setting up administrative review procedures. In this case, review by the Labor Commissioner normally is required to determine the validity of a talent-representative contract. States may not interject their judiciary systems in disputes where the parties have agreed to arbitration, and the same policy applies to state administrative proceedings.

This is particularly compelling in this case, where review by the Labor Commissioner is not an *alternative to*, but is an *integral part of* state judicial proceedings in California. Under state law, the Labor

Commissioner's determination is subject to *de novo* review in state court. *Sinnamon v. McKay*, 191 Cal. Rptr. 295; 142 Cal. App. 3d 847, 850 (Cal. Ct. App. 1983). The administrative determination, therefore, *is* in all essentials a state judicial proceeding. *Buckeye Check Cashing* should therefore control the result.

CONCLUSION

The decision of the California Court of Appeal should be *reversed.*

DATED: November, 2007.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ARNOLD M. PRESTON,
Petitioner

v.

ALEX E. FERRER,
Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA

BRIEF OF SCREEN ACTORS GUILD, INC. AND AMERICAN FEDERATION OF TELEVISION & RADIO ARTISTS, AFL-CIO AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Amici are labor unions representing artists in the motion picture, television, commercial and new media industries.

Amicus Screen Actors Guild, Inc. ("SAG") is the nation's largest labor union representing working actors. Established in 1933, SAG represents more than 120,000 working actors and other performers in film, television, industrials, commercials, music videos, and new media. SAG exists to protect and enhance actors' working conditions, compensation and benefits and to be a powerful, unified voice on behalf of artists' rights.

Amicus American Federation of Television and Radio Artists, AFL-CIO ("AFTRA") is a national labor organization with a membership of over 80,000 professional artists, including but not limited to, actors, broadcasters and recording artists who work in the television, radio and sound recording industries nationwide.

Amici have collective bargaining agreements with all of the major motion picture and television production companies, television networks, and/or

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Letters evidencing the parties' consent to the filing of this brief are on file with the Court and copies are attached hereto.

commercial producers. These collective bargaining agreements govern the wages, hours, and working conditions of *Amici*'s members.

Through their internal regulations and, as applicable, through agreements with non-profit trade associations, such as the Association of Talent Agents ("ATA") and National Association of Talent Representatives ("NATR"), *Amici* extensively regulate the relationships between their members and the talent agents who represent them and require that talent agents who represent their members be bound by a comprehensive set of regulations referred to as a franchise.[2] Other entertainment unions, including Directors Guild of America ("DGA"), and Writers Guild of America ("WGA"),[3] similarly regulate their members' relationships with their agents. The Unions' franchises establish standards of conduct for talent agents and require them to comply with certain conditions and limitations which augment and supplement provisions in the California Talent Agencies Act, including, but not limited to, the establishment of separate client trust accounts, posting of surety bonds, and limits on commission rates. The franchises also create standard form contracts for talent representation and place restrictions on talent agents' economic interests in production activities. As allowed under the arbitration language in the TAA, the franchises

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2 *See infra.*

3 SAG, AFTRA, DGA, and WGA are referred to collectively herein as the "Unions".

require that disputes between agents and their clients be arbitrated.

The consistent enforcement of the TAA against those who encroach on its jurisdiction is essential to protecting those who are the most vulnerable to abuse by those who seek to profit from them. As the effective enforcement of the TAA is critical to the Unions' agency franchise systems and to the protection of their members, the *Amici* and their members have a fundamental interest in ensuring these protections are not eroded.

SUMMARY OF ARGUMENT

The entertainment industry has a unique culture that attracts diverse participants with varying motives. Some are attracted by the opportunity for artistic expression, others by business and profit motives. And still others seek to manipulate both the system and those most vulnerable within it to reap personal gain. This vulnerability combined with the unique mechanisms by which artists gain employment, as well as the very brief duration common to most industry jobs for artists, gives those who control the procurement of artists' employment immense power. For these reasons, and in light of recurring abuses at the expense of artists, the California Legislature has long recognized the need to regulate those who procure employment for artists.

For nearly a century, California has regulated the act of procuring employment on behalf of artists. The current incarnation of that regulation is the Talent Agencies Act, CAL. LAB. CODE § 1700, *et. seq.* (hereafter "TAA" or the "Act"), a comprehensive regulatory and licensing scheme which mandates that anyone who procures employment on behalf of an artist be licensed. For nearly three quarters of a century, the Labor Commissioner has been empowered to create rules and regulations under the Act and its predecessor laws and has had original jurisdiction to hear controversies arising under it, subject to *de novo* review.

In the instant matter, Petitioner, Arnold Preston, challenges the Labor Commissioner's

jurisdiction to hear a claim arising out of his personal management contract with Alex Ferrer. Petitioner basis his challenge on an arbitration provision included in the management contract, a provision that incorporated California law, contending that the Federal Arbitration Act (hereafter, "FAA"), 9 U.S.C. §1, *et. seq.*, mandates arbitration and divests the Labor Commissioner of her statutory authority. Although the contract between the parties was for management services, Respondent alleged that Petitioner had acted as an unlicensed talent agent by attempting to procure employment on his behalf. When a dispute arose between the parties, the Petitioner initiated arbitration proceedings and the Respondent, as mandated by the TAA, sought the Labor Commissioner's review. The Labor Commissioner found there was a colorable basis for the exercise of her jurisdiction under the TAA and agreed to hear the dispute. Believing the Labor Commissioner's opinion could be informative, the arbitrator stayed the arbitration pending the Labor Commissioner's determination.

The TAA is a remedial statute crafted by the California Legislature in an exercise of the state's police power. It is critical to protecting vulnerable individuals in an environment where aspirants will do almost anything to "make it big." The TAA is carefully balanced to protect the interest of both the artists it protects and the agents it regulates. The consistent enforcement of the TAA is critical to maintain this careful balance, as the court below recognized.

Nothing in the TAA conflicts with the FAA, as the Petitioner claims. There is no state statute that acts as a complete bar to arbitration. At best, the TAA delays arbitration while the Labor Commissioner completes her inquiry through a cost-effective administrative hearing process that is subject to *de novo* review. Nothing prevents the parties from seeking that *de novo* review before an arbitrator, rather than through the courts. Further, as the arbitrator in this matter recognized when he stayed the proceedings, the Labor Commissioner's expertise may provide valuable guidance to the arbitrator.

Petitioner seeks to divest the Commissioner of her jurisdiction to hear a large class of controversies arising under the TAA based on a private agreement between the parties. Such a divestment of the Labor Commissioner's jurisdiction potentially opens a loophole that could be devastating to the enforcement of the TAA against unlicensed individuals. If Petitioner's approach is adopted, an individual could simply insert an arbitration provision in a contract and then blatantly flout the TAA's licensing requirements with confidence that the Labor Commissioner lacks jurisdiction to hear any disputes under that contract. Such an approach would also divest the Labor Commissioner of her most important tool in effectively administering her responsibility to enforce the TAA.

The *Amici* therefore urges this Court to affirm the decision below.

ARGUMENT

I. The Talent Agencies Act is an Exercise of California's Police Power to Regulate in a Creative Industry Where Individuals are Vulnerable to Abuse

Artists in the entertainment industry typically rely on a small army of people to help support their careers – an army that grows in size as the artist's career grows. Agents find job opportunities and assist them in securing employment and negotiating its terms; personal managers counsel and guide their careers, often advising them which job opportunities to pursue or which agent to engage; business managers assist with the artists' financial management; attorneys provide legal services; publicists promote the artist and guide him in his dealings with the media; and the Unions provide protections in the form of minimum standards for wages and working conditions. Each of these support functions, as well as many others, plays a particular role in an artist's career. Some of the role differentiation arises from the individuals' skills; others are the result of regulatory schemes designed to protect the artist.

The unique nature of the entertainment industry gives those who guide artists' careers and those who control the procurement of employment immense power over artists. Few artists are in a position to scrutinize or challenge these trusted advisors. And even fewer have sufficient expertise or clout to effectively negotiate the terms of their representation, especially when faced with the take-

it-or-leave it choice of accepting representation under unfavorable terms or having no representation at all. For these reasons, and in light of recurring abuses at the expense of artists, the California Legislature has long recognized the need for regulation of those who hold the keys to artists' careers.

Recognizing the power dynamic between artists and those who hold the keys to their employment, the state, exercising its police power to protect artists, determined that one must be regulated to hold those keys. One of the primary, and empirically most effective, enforcement mechanisms to ensure compliance with the TAA has been administrative adjudication before the California Labor Commissioner, who is tasked with such enforcement. When an unlicensed individual has procured employment in violation of the TAA, a regulatory statute prohibiting such conduct, the Labor Commissioner has discretion to declare the resulting contract void.[4] The possibility of losing all commissions is a tremendous disincentive to violating the Act.

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[4] For decades, and with only few exceptions, the Labor Commissioner and the California courts have held that when an unlicensed individual violates the TAA, the resulting contract is void, *ab initio*. The California Supreme Court is currently weighing the issue of whether the contract is always to be void *ab initio* or whether it is appropriate to sever commissions earned for the unlawful conduct from those earned for lawful conduct under the parties' agreement. *See, Marathon Entertainment v. Blasi*, 140 Cal. App. 4th 1001, *review granted*, 143 P.3d 656; 49 Cal. Rptr. 3d 656.

A. The Talent Agencies Act is a Remedial Law Intended to Protect Artists from Those Who Hold the Keys to Their Careers and Could Take Advantage of Them

The TAA is a carefully crafted statute that balances the interests of artists and those who represent them. The Act provides a detailed regulatory and licensing scheme and includes various protections against misconduct by licensed agents. The Labor Commissioner is charged with enforcing the TAA and adjudicating claims arising from alleged violations of it, whether by licensed or unlicensed individuals.

The Act strictly regulates procurement of entertainment-related employment to ensure the welfare of artists. *Waisbren v. Peppercorn Productions, Inc.* 41 Cal. App. 4th 246 (1995). It is a remedial law, within the police power of the state, designed to correct abuses and enacted for the protection of artists. *Buchwald v. Superior Court,* 254 Cal. App. 2d 347, 350-351 (1967). *See, also, Styne v. Stevens,* 26 Cal. 4th 42 (2001).

1. History of the Talent Agencies Act

The act of procuring employment for artists has been regulated for nearly a century and the Labor Commissioner has had original jurisdiction to hear disputes arising from such conduct for nearly as long. The Private Employment Agencies Law (hereafter "PEAL"), enacted in 1913, included regulations covering "theatrical employment agencies," which, at the time, operated within the context of "circuses, vaudeville, theatrical and other

entertainers, exhibitors, and performers." *Buchwald v Katz*, 8 Cal. 3d 493 (1972); CAL. DEP'T OF INDUS. RELATIONS, CAL. ENTERTAINMENT COMM'N REP. (1985) at 6 (citing 1913 Cal. Stat. 282). In 1923, the PEAL was amended to empower the Labor Commissioner to make rules and regulations and to give the Labor Commissioner original jurisdiction to hear and determine all controversies arising under it. *Buchwald*, 8 Cal. 3d at 500 (citing 1923 Cal. Stat. 412). The language in the 1923 amendment was virtually identical to the language that remains in the TAA to this day. *Id.*

The PEAL was incorporated into the California Labor Code when it was enacted in 1937 and another category of employment agency – the "motion picture employment agency" was added. *Id. at 501*; CAL. ENTERTAINMENT COMM'N REP. at 7 (citing 1937 Cal. Stat. 230). The "artist manager" was added to the Employment Agencies Act (hereafter "EAA") in 1943 and then, in 1959, was separated from that Act into their own section. *Id* at 7 (citing 1959 Cal. Stat. 888).

The California Legislature repealed the EAA in 1967 but left the regulation of artist managers – the Artists' Manager Act – in the Labor Code. CAL. ENTERTAINMENT COMM'N REP. at 8. From 1943, when first added to the EAA, until 1978 when the law was renamed the TAA, "artist manager" was defined as:

> "A person who engages in the occupation of advising, counseling, or directing artists in the development or advancement of their careers and

> who procures, offers, promises or attempts to procure employment or engagements..." CAL. ENTERTAINMENT COMM'N REP. at 7, (quoting 1943 Cal. Stat. 1326)

When the Act was renamed in 1978, the term "artist manager" was removed and replaced with "talent agent," which was, and still is, defined as:

> "[a] person or corporation who engages in the occupation of procuring, offering, promising or attempting to procure employment engagement for an artist or artists." CAL. ENTERTAINMENT COMM'N REP. at 8-9 (quoting Cal. Lab. Code § 1700.4)

The definition further states that a talent agent "may, in addition, counsel or direct artists in the development of their professional careers." Cal. Lab. Code §1700.4. These definitional changes placed the regulatory emphasis on the act of procuring employment, the domain of agents, and deemphasized the advisory functions typically performed by managers. [5]

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[5] As noted by the California Court of Appeal in *Waisbren*, "the primary function of the personal manager is that of advising, counseling, directing and coordinating the artist in the development of the artist's career.' The manager's task encompasses matters of both business and personal significance. As business advisors, they might attend to the artist's finances, and they routinely organize the economic

The legislature made several amendments to the Act in 1982 including creating several safe harbors. Specifically, and most relevant to the instant matter, the legislature added a safe-harbor provision for unlicensed individuals working "in conjunction with, and at the request of, a duly licensed and franchised talent agency *in the negotiation of an employment contract.*" CAL. LAB. CODE §1700.44 (emphasis added). These same amendments also removed the criminal penalties for violation of the Act and exempted procuring of recording contracts from its prohibitions. CAL. ENTERTAINMENT COMM'N REP at 9, 25. At the same time, the Legislature created the California Entertainment Commission (hereafter, the "Commission") to study the Act and, if applicable, to suggest changes. *Id* at 11.

2. The California Entertainment Commission Concluded that, for the Protection of Artists, Anyone who Procures Employment for Artists Should be Licensed and Subject to Regulation by the Labor Commissioner

The California Legislature created the California Entertainment Commission in 1982 to study the laws and practices of this and other states

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elements of the artist's personal and creative life necessary to bring the client's product to fruition..." *Waisbren*, quoting O'Brien, *Regulation of Attorneys Under California's Talent Agencies Act: a Tautological Approach to Protecting Artists* 80 Cal.L.Rev. 471, 481-483 (1982),fns. omitted. But a manager may not procure employment for an artist without first being licensed as an agent. *Waisbren* at 259.

relating to the regulation of artists' agents and representatives in the entertainment industry. *Waisbren,* 41 Cal. App. 4th at 256. The Commission was comprised of the Labor Commissioner, three talent agents, three personal managers, and three artists. CAL. ENTERTAINMENT COMM'N REP. at 1- 4. Its 1985 report to the Legislature and Governor formed the basis for the 1986 amendments to the TAA. *Waisbren*, 41 Cal. App. 4th at 258.

In its report, the Commission addressed six (6) principal issues, three (3) of which are especially relevant in the present case. Those three issues are:

> 1. Under what conditions or circumstances, if any, should a personal manager or anyone other than a licensed talent agent be allowed to procure, offer, promise, or attempt to procure employment or engagements... for an artist without being licensed as a talent agent? ...
>
> 3. Should the criminal sanctions of the Act ... be reinstated and, if so, in what form? ...
>
> 5. Should the entire Act be repealed and/or should there be a separate licensing law for personal managers? ..." CAL. ENTERTAINMENT COMM'N REP., at 12.

The Commission's response to the first and fifth issues were straightforward and clear – the Act regulates the procurement of employment and, for the protection of artists, anyone who procures

employment for an artist must be licensed. Specifically, the Commission concluded that "personal managers or anyone not licensed as a talent agent should not, under any condition or circumstances, be allowed to procure employment for an artist without being licensed as a talent agent," other than as already permitted by the Act, no matter how incidental, occasional or infrequent. CAL. ENTERTAINMENT COMM'N REP. at 13, 19.

In addressing whether the criminal penalties should be reinstated into the Act, the Commission found them to be unnecessary because existing remedies were adequate. *Id.* at 26-27. Specifically, the Commission stated that "[p]erhaps the most effective weapon for assuring compliance with the Act is the power of the Labor Commissioner... to find that a personal manager or anyone has acted as an unlicensed talent agent and, having so found, declare the contract void from the inception and order restitution to the artist of all fees paid by the artist and the forfeiture of all expenses advanced to the artist." *Id.* at 27.

In response to the fifth issue, the Commission concluded that there is no need to separately license personal managers because it is the act of procurement that must be regulated, not the individual person. The Commission reasoned that such a licensing scheme would be needlessly duplicative with the Act, stating that "[I]t is not, in fact, the person who is being licensed by the [Act]: rather, it is the activity of procuring employment." *Id.* at 31. In the words of the Commission, "one either is, or is not, licensed as a talent agent..." and

unlicensed individuals may not engage in acts of procurement. *Id.* at 31.

In summary, the Commission concluded that the Act proscribed any acts of procuring employment for an artist without a talent agency license – a view that was adopted by the *Waisbren* Court in its holding and has remained the prevailing law to date. *Waisbren*, 41 Cal. App. 4th at 259.

3. The Talent Agencies Act and the Unions' Franchise System Provide a Comprehensive Regulatory and Enforcement Scheme for the Representation of Artists in the Entertainment Industry

The TAA provides a comprehensive regulatory scheme for the licensing and oversight of talent agents by the Labor Commissioner.[6] Under the TAA, anyone who seeks to procure employment for an artist, whether or not he is successful in that regard and regardless of whether he calls himself an agent, must be licensed as a talent agency.[7] The Act is

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[6] Similarly, each of the Unions has its own regulatory scheme for the franchising of talent agents. The Unions' requirements are often parallel to the TAA's regulations and, in some instances provide for stricter scrutiny of and additional assurances from the applicant agent.

[7] The Act defines "talent agency" as "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for ... artists..." CAL. LAB. CODE §1700.4. The Act defines "artists" to include a range of individuals in the entertainment industry, including actors, radio artists,

clear in that regard, as are the decades of administrative and judicial decisions interpreting it. *See, e.g., Buchwald*, 254 Cal. App. 2d 347 at 355 ("artists' managers (as defined by the Act), whether they be licensed or unlicensed, are bound and regulated by the Artists' Managers Act"); *Waisbren*, 41 Cal. App. 4th 246.

In addition to complying with the Act's requirements, each of the Unions requires that agents wishing to represent its members, and individuals working within the Union's jurisdiction, obtain a franchise from the Union.[8] The franchises set forth additional protections for each Union's members that expand upon and supplement those in the Act. These franchises establish standards of conduct for talent agents and require them to comply

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directors, writers, and "other artists and persons rendering professional services" in the entertainment industry. *Id.* The terms "talent agency", "talent agent", "agency," and "agent" as used herein are all intended to refer to a "talent agency" as defined in the Act.

[8] The Basic Contract between SAG and the ATA and NATR, which governed the formal relationship between them, expired on or about October 20, 2000. No amendment or extension has since been entered into, other than a fifteen (15) month period during which ATA and/or NATR-member agents maintained the status quo. Although SAG's membership rules include a complete prohibition of its members working with agents who are not franchised, SAG has temporarily stayed enforcement of this rule for those members who are represented by ATA and/or NATR-member agents pending further action. The formal relationship between AFTRA and the ATA and NATR remains in full effect.

with certain conditions and limitations that augment and supplement the provisions in the Act. [9]

Recognizing that talent agents may need periodic assistance, the TAA includes a "safe harbor" exception for unlicensed individuals. Specifically, it allows unlicensed individuals to work "in conjunction with, and at the request of, a licensed talent agency in the *negotiation of an employment contract.*" CAL. LAB. CODE §1700.44 (emphasis added). This is the sole exception for unlicensed individuals and nothing in the Act allows them to actually procure employment on an artist's, other than a recording artist's, behalf.

Consistent with its predecessor statutes, the TAA grants the Labor Commissioner exclusive original jurisdiction to hear disputes arising under the Act, subject to *de novo* appeal.[10] CAL. LAB. CODE § 1700.44 The Labor Commissioner has exclusive jurisdiction to determine whether claims fall within her jurisdiction and, having so determined, to adjudicate those claims. *Styne v. Stevens*, 26 Cal. 4th 42 (holding that when a case presents a colorable basis for exercise of the Labor Commissioner's jurisdiction, the Labor Commissioner has exclusive original jurisdiction). *See, also, Buchwald v. Katz*, 8 Cal. 3d 493; *Buchwald v. Superior Court*, 254 Cal App. 2d 347.

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[9] Each of the Unions requires that a talent agent seeking to represent its members have a valid license as a prerequisite to becoming franchised.

[10] *See infra.*

The Act includes many protections for artists that are not legally imposed on unlicensed individuals, including an express fiduciary duty and dispute resolution mechanism. Without the protections and remedies incorporated in the TAA and the Union franchises, vulnerable artists may find themselves without a remedy in instances of malfeasance.

II. There is No Conflict between the Federal Arbitration Act and the Talent Agencies Act Sufficient to Divest the Labor Commissioner of Original Jurisdiction

At the center of the instant dispute is whether an administrative proceeding under the TAA is pre-empted by the FAA. Petitioner relies largely on *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440 (2006), in support of his position that the Federal Arbitration Act requires that a challenge to the validity of the contract be raised in arbitration, rather than before the administrative agency tasked with enforcing an applicable licensing scheme. While *Buckeye* does address a challenge to the validity of a contract based on a statutory violation, it does not address the situation where an administrative agency has been tasked with enforcing a regulatory statute.

The provision of the TAA at issue in the instant matter, Section 1700.44[11](hereafter, "Section

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[11] Section 1700.44 provides:

> "(a) In cases of controversy arising under this chapter, the parties involved shall refer the matters

1700.44"), grants the Labor Commissioner original jurisdiction to hear all disputes arising under the TAA. CAL. LAB. CODE §1700.44. The Labor Commissioner's determination is subject to appeal and *de novo* review. CAL. LAB. CODE §1700.44. While Section 1700.44 provides for appeal to the superior court, there is no prohibition on the parties then instituting arbitration proceedings pursuant to the terms of their contract.

A. The Administrative Remedy Set Forth in the TAA does not Stand as an Obstacle to Effecting the Purposes of Congress in Enacting the Federal Arbitration Act

Congress enacted the Federal Arbitration Act to overcome judicial resistance to arbitration. *Buckeye,* 546 U.S. at 443. It established a national policy favoring arbitration and placing arbitration agreements on an equal footing with other types of contracts. *Id.; Southland Corp. v. Keating,* 465 U.S. 1 (1984). Specifically, it provides that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such

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in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo...." CAL. LAB. CODE §1700.44

> contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. §2

The Court has held that the FAA is violated by state laws that declare arbitration provisions unenforceable. *See e.g. Southland,* 465 U.S. 1. (holding that a state law requiring judicial consideration of claims under the statute violated the FAA); *Perry v. Thomas*, 482 U.S.483 (1987) (a statute's requirement that litigants be provided a judicial forum for resolving wage disputes was in conflict with the FAA). But the Court has not directly addressed whether the FAA pre-empts a state regulatory statute that merely delays arbitration while a state administrative agency reviews an alleged violation of a statute it is tasked with administering.

1. Administrative Adjudication By The Labor Commissioner Does Not Bar Enforcement Of The Parties' Agreement To Arbitrate And Is Therefore Not In Conflict With The FAA.

The administrative review and adjudication required under the TAA, adjudication which is

subject to *de novo* review, does not invalidate the parties' arbitration agreement. At most, it simply delays resort to arbitration until the parties administrative remedies have been exhausted. Section 1700.44(a) specifically provides that the administrative adjudication by the Labor Commissioner is subject to appeal and *de novo* review. The appeal is, in essence, a new trial and not merely a review of the Labor Commissioner's decision. *Buchwald v. Katz*, 8 Cal. 3d 493, 502. As the California Supreme Court, interpreting an earlier, but nearly identical, version of Section 1700.44 points out:

> "A hearing *de novo* literally means a new hearing, or a hearing the second time... It is in no sense a review of the hearing previously held, but is a complete trial of the controversy, the same as if no previous hearing had ever been held. A hearing *de novo* therefore is nothing more nor less than a trial of the controverted matter by the court in which it is held." *Buchwald* at 501 (quoting *Collier & Wallis, Ltd. v Astor,* 9 Cal.2d 202, 205(1937)).

Although the TAA provides that appeal from the Labor Commissioner's decision is to be brought in the superior court, nothing in the language of Section 1700.44(a) provides, nor even suggests, any intent to preclude resort, on *de novo* appeal, to arbitration. While Section 1700.44(a)'s language requires the appealing party bring its appeal in the superior

court, the parties may then freely enforce their agreement to arbitrate their claims, through application of either the California Arbitration Act, CAL. CODE. CIV. PROC. §§1281 *et seq.* or the FAA.

A statutory requirement, such as the one found in the TAA, that claims be brought initially before an administrative agency for nonbinding adjudication does not deprive the parties of their right to arbitrate. At most, it causes a brief delay in when the parties may initiate arbitration. As such, it does not run contrary to the FAA or the lines of cases interpreting it.

What must not be lost, in this matter, is that the arbitration was stayed *by the arbitrator*, irrespective of any proceedings in the superior court to stay arbitration. The parties freely exercised their right to arbitration but, recognizing the value of the proceedings before the Labor Commissioner, the arbitrator chose to defer to the administrative agency with specific expertise in the area of dispute.

2. The TAA Expressly Allows For Arbitration in Lieu of Administrative Remedies When the Arbitration Provision Complies With Standard Set Forth in the TAA

The TAA also expressly allows parties to provide that disputes be arbitrated in lieu of proceeding before the Labor Commissioner, provided certain conditions are met. Section 1700.45 provides that, notwithstanding Section 1700.44's requirement that disputes be referred to the Labor Commissioner, an provision in a contract requiring arbitration of

"any controversy under the contract or as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination, shall be valid

> "(a) If the provision is contained in a contract between a talent agency and a person for whom the talent agency under the contract undertakes to endeavor to secure employment, or
>
> (b) If the provision is inserted in the contract pursuant to any rule, regulation, or contract of a bona fide labor union regulating the relations of its members to a talent agency..." CAL. LAB. CODE § 1700.45

However, because the TAA is an exercise of the state's police power that the Labor Commissioner is charged with enforcing, to be effective, the arbitration provision must provide the Labor Commissioner notice of and an opportunity to be present at the hearings. Specifically, it provides that an arbitration provision, in addition to complying with either subsection (a) or (b), is valid:

> "(c) If the contract provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings, and
>
> (d) If the contract provides that the Labor Commissioner or his or her authorized representative has the right to attend all arbitration hearings." CAL. LAB. CODE § 1700.45

The arbitration provision at issue in the instant matter did not comply with any of the requirements to be valid under Section 1700.45. Because it did not adequately comply with Section 1700.45, it was not adequate to bypass the Labor Commissioner's original jurisdiction to hear the dispute.

B. The TAA's Administrative Exhaustion Requirement is Consistent with Prior Cases Interpreting the FAA

The importance of the role played by administrative agencies in adjudicating disputes relating to the laws they are tasked with enforcing has long been recognized by the Court. The doctrine of exhaustion is well established in administrative jurisprudence and provides that a party may not seek its judicial remedies until its administrative remedies have been exhausted. *See e.g., McKart v. United States*, 395 U.S. 185, 193 (1969) (citing 3 K. Davis, Administrative Law Treatise § 20.01 et seq. (1958 ed., 1965 Supp.); L. Jaffe, Judicial Control of Administrative Action 424-458 (1965); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). In fact, just last year, the Court held that, in the context of prison litigation, that one must exhaust his administrative remedies prior to any resort to a judicial forum. *Woodford v. Ngo*, 126 S. Ct. 2378 (2006) This principle should apply no less when a party seeks to resort to arbitration prior to exhausting the administrative process, especially when that administrative process acts only as a delay to arbitration and not a complete bar.

In *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2001), the Court recognized the importance of allowing an administrative agency to fulfill its statutory mandate, even where the parties had agreed to arbitrate their dispute. The Court stated that that the "policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so." *Id.* at 294. The Court further went on to state that binding the E.E.O.C to the private arbitration agreement "would [have] undermine[d] the detailed enforcement scheme ... simply to give greater effect to an agreement between private parties that does not even contemplate the [agency's] statutory function." *Id.* at 296. These same principles are no less important when, as here, it is a state agency tasked with enforcing an important public policy.

This Court has also recognized that, while statutory claims may be arbitrated, just as those arising out of contract, "'not ... all controversies implicating statutory rights are suitable for arbitration.'" *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066, 1075 (1999) (quoting *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 627 (1985)). The California Supreme Court, recognizing the state's police power to protect its residents, has followed that line in holding that arbitration agreements cannot "serve as a waiver of [certain] statutory rights" when that waiver would be contrary to public policy. *Armendariz v. Found. Health Psychare Servs., Inc.*, 24 Cal. 4th 83, 100-101 (2000). The Labor Commissioner is tasked with protecting the public policy concerns underlying the

TAA and her jurisdiction to hear those matters, in the first instance, should not be diminished.

The Court has previously recognized that a state statute which acts merely as a delay to arbitration does not conflict with the FAA and may be enforced. Where the parties have incorporated state laws or remedies through their choice of forum, that choice should be upheld as long as they do not bar the arbitrator as the ultimate arbiter of the claim. As the Court has stated, "[t]he FAA's central purpose is to ensure 'that private agreements to arbitrate are enforced according to their terms." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

In *Volt*, the Court addressed whether the FAA pre-empted a state statute that permitted a stay of arbitration pending the outcome of related litigation. *Volt*, 489 U.S. at 471. In upholding the arbitration-delaying statute, the Court reasoned that the purpose of the FAA was "'motivated... by a congressional desire to enforce agreements into which the parties had entered,'" *Id. at 478* (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, at 220 (1985)), and to enforce them according to their terms. *Id.* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n.12 (1967)). The Court in *Volt* refused to apply the FAA to pre-empt a state law that merely delayed arbitration even though the end result was that "arbitration [was] stayed where the [FAA] would otherwise permit it to go forward." *Id.* at 479.

The parties to the instant dispute specifically incorporated the laws of California into their contract and provided that the contract would be interpreted in accordance with those laws. As a result, the parties agreed to be bound by the provisions of the TAA, including the Labor Commissioner's jurisdiction. If Petitioner's actions violated that regulatory scheme such that he was acting as an unlicensed talent agent, as Respondent contended, the Labor Commissioner has exclusive original jurisdiction to hear the dispute in order to fulfill her statutory mandate to enforce the Act and the parties must first exhaust their administrative remedies. As in *Volt*, when that proceeding is concluded, and the parties' administrative remedies have been exhausted, the parties are free to proceed to arbitration.

C. The Labor Commissioner is Best Situated, in the First Instance, to Review Cases that Arise Under the TAA

The California Court of Appeal, in reaching its decision in this case, found that "it is appropriate for the Commissioner to resolve the dispute between the parties, for '[t]he Commissioner's expertise in applying the Act is particularly significant in cases where, as here, the essence of the parties' dispute is whether services performed were by a talent agency for an artist.'" *Ferrer v. Preston,* 145 Cal. App. 4th 440, 445 (2006) (*quoting Styne v. Stevens* 26 Cal.4th 42 at 58). The Court of Appeal added, "the Commissioner['s] ... interpretation of a statute he is charged with enforcing deserves substantial weight." *Id.* This Court has recognized that "since agency

decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise." *McKart*, 395 U.S. at 194

For three-quarters of a century, the Labor Commissioner has been charged with interpreting and applying the TAA and its predecessor statutes governing the procurement of employment in the entertainment industry. The Labor Commissioner's expertise in this area is extensive and well established through decades of administrative and judicial precedent. Based on that expertise, the Commissioner's interpretation of the statute as applied to the facts of a particular case may be of value, even upon *de novo* review. The Labor Commissioner's decision may also aid the parties in settling the case prior to review, whether in court or by arbitration, as they will have received an objective evaluation of the merits of their respective position.

In the instant matter, the arbitrator recognized the value of the Labor Commissioner's expertise when he granted a stay of the arbitration proceedings pending the outcome of the hearing before the Labor Commissioner. The arbitrator reasoned that a stay was appropriate, in part, "because the results of the Labor Commissioner hearing also could inform the Arbitrator as to the remedy or relief that would be just and equitable under the circumstances of this case." JOINT APPENDIX at 38.

In addition to the expertise the Labor Commissioner brings, the requirement that all

proceedings involving violations of the TAA be heard by her, or that she be given notice of and an opportunity to attend arbitrations, serves an added benefit to the public as a whole, even if it causes some delay to individual parties. This oversight ensures that the Labor Commissioner is aware of the nature and details of all claims arising out of the statute so she can most effectively enforce it. It also provides her relevant information to advise the Governor and Legislature of changes to the Act that may be necessary to serve its ultimate purpose of protecting artists in an industry rife with abuse. The minor inconvenience caused the parties by any delay is outweighed by the public policy interest in protecting a broader class of vulnerable individuals.

III. Reversal of the Decision Below Would Create a Potential Loophole to Enforcement of the Talent Agencies Act Against Unlicensed Individuals to the Detriment of Those it is Intended to Protect

The Petitioner asks the Court to open a potential loophole in the TAA that could prove disastrous to its enforcement and to the enforcement of the Unions' franchise systems – even to the point of potentially unraveling the entire regulatory scheme. As the TAA does not contain criminal provisions, the most effective deterrent to individuals crossing the line to unlawfully procure employment for artists has long been the risk that the Labor Commissioner would void a contract in its entirety when that line has been crossed. But, by inserting an arbitration provision in a representation contract, even where the representative is acting as an

unlicensed agent, much of the disincentive to violating the TAA may be eliminated.

Artists often find themselves in a position where they have little to no leverage to negotiate the terms of their representation agreements. They may not have the understanding or the negotiating clout to negotiate around an arbitration provision in the representation agreements they are presented. Few artists would comprehend that agreeing to such a provision might divest the administrative agency tasked with protecting them of jurisdiction over their claims in situations where an individual trusted to guide their career abuses that trust.

If the decision below is reversed, the likely consequence is a deterioration of the Labor Commissioner's ability to enforce the TAA against unlicensed individuals. Individuals seeking to avoid the TAA's licensing requirements could potentially do so simply by inserting an arbitration clause into their representation agreements. As the TAA does not contain criminal provisions or enforcement mechanism against unlicensed individuals other than individual claims, where there is an arbitration provision in an individual representation agreement, the Labor Commissioner is left with no way to enforce the act she is charged with enforcing.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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No. 06-1463

In The
Supreme Court of the United States

ARNOLD M. PRESTON,

Petitioner,

v.

ALEX E. FERRER,

Respondent.

On Writ Of Certiorari To The California Court Of Appeal For The Second Appellate District, Division One

BRIEF *AMICUS CURIAE* OF THE WILLIAM MORRIS AGENCY IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether California's Talent Agencies Act, Cal. Labor Code § 1700 *et seq.*, is preempted by the Federal Arbitration Act, 9 U.S.C. § 2, insofar as California's regulatory system is appropriately-tailored to oversee a unique labor market and recourse to administrative agency review, pursuant to the arbitral clause agreed to by the parties, is not inconsistent with Congress's objective of promoting arbitration?

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BRIEF *AMICUS CURIAE* OF THE WILLIAM MORRIS AGENCY

The William Morris Agency submits this brief as *amicus curiae* on behalf of respondent Alex E. Ferrer.[1]

INTEREST OF *AMICUS CURIAE*

1. Founded in 1898, the William Morris Agency (WMA) is the largest and most diversified talent and literary agency in the world, with principal offices in New York, Beverly Hills, Nashville, London, Miami Beach and Shanghai. The Agency represents clients in all segments of the entertainment industry, including motion pictures, television, music and personal appearances, Broadway theatre and theatrical touring, book publishing, commercial endorsements, sports marketing, corporate consulting, digital media, and video games.

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[1] Pursuant to S.Ct. R. 37.3(a), all parties have consented to the filing of the brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, or its counsel, made a monetary contribution to its preparation or submission.

Amicus Curiae's relationship with Respondent, and the underlying transactions in this case, are fully disclosed in the following section.

In 1898, a young German Jewish immigrant posted a cross-hatch trademark above his door in New York City – four X's, representing a W superimposed on an M – and went into business as "William Morris, Vaudeville Agent." During an illustrious history that spans three centuries, immortalized in print and on stage,[2] the William Morris Agency played an integral role in shaping the face of entertainment. By the time WMA formally incorporated in New York State on January 31, 1918, Morris was joined by son William, Jr., and by Abe Lastfogel as directors of the company.

As silent film grew into an exciting new form of entertainment, Morris was quick to encourage his performing clients to experiment in the new medium while the competition held fast to vaudeville. Stars such as Al Jolson, the Marx Brothers, Mae West and Charlie Chaplin helped forge the Agency's dominance in both New York and Hollywood. The momentum continued to build during the 1920's. Clients included such luminaries as George Jessel. The nascent medium of radio provided yet another frontier to explore. By 1930, after some 32 years at the helm, Morris passed leadership of the agency to his son and Abe Lastfogel. With Morris, Jr. heading the new office in Los Angeles and Mr. Lastfogel running the operation in New York City, the Agency featured an impressive

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[2] See, e.g., Frank Rose, THE AGENCY: WILLIAM MORRIS AND THE HIDDEN HISTORY OF SHOW BUSINESS (1995); *Bye Bye Birdie* (Broadway 1960) (book by Michael Stewart) (Albert Peterson, talent agent for Conrad Birdie, appears to have an affiliation with a thinly-disguised WMA).

roster of clients, including such superstars as Jimmy Cagney, Louis Armstrong and Will Rogers. WMA attained further industry dominance with the December 1949 acquisition of the Berg-Allenberg Agency. New clients included Frank Capra, Clark Gable and Judy Garland, joining a roster that already included Sammy Davis, Jr., Milton Berle and Rita Hayworth.

With the arrival of television, the 1940's also presented yet another entertainment frontier to conquer. Some worried about television's impact on the health of the film industry, but WMA recognized a new business paradigm that would eventually make it possible to package stars, producers, writers and show concepts for sale to corporate sponsors, which controlled television's early days. The following decades brought unimagined success to scores of WMA clients, including Steve McQueen, Frank Sinatra, Andy Griffith, Marilyn Monroe, Elvis Presley, Katharine Hepburn, Jack Lemmon, Walter Matthau, Kim Novak, Dick Van Dyke and Bill Cosby.

By 1965, WMA's Music Department had emerged as an industry powerhouse, representing, among others, the Rolling Stones, the Byrds, the Beach Boys and Sonny & Cher. Less than 10 years later, in 1973, the Agency's newly established Nashville office provided another significant boost to the operations of William Morris, extending the Agency's reach into country music and beyond. During the 1980's, the Agency continued to expand in other ways, acquiring the Jim Halsey Company, adding performers such as The Oak Ridge Boys, Waylon Jennings and Tammy

Wynette.

The early 1990's also brought great success to WMA's Literary Department, which announced the largest book-to-screen deal ever inked when it sold the television rights for "Scarlett," the sequel to Margaret Mitchell's GONE WITH THE WIND. WMA later broke new ground with the creation of the Corporate Advisory/New Media Department, which evolved into William Morris Consulting (WMC). WMC now operates in a broad spectrum of industry segments, including telecommunications, technology, lodging, gaming, publishing, retail, and consumer products.

The Willi am Morris Agency is committed to being a world-class corporate citizen. We believe that the success of our clients and, ultimately, of our Agency is inextricably tied to our role as a socially-responsible company. Since the 1940's, WMA has taken an industry-leading role as a civic-minded organization. Then, as now, our company understands charitable engagement is a critical aspect of our legacy. This conviction has led to the formation of the Lastfogel Foundation of the William Morris Agency, which encourages young people and their families to participate in arts, education, health and the environmental programs dedicated to the communities where we live and work.

2. The William Morris Agency has a tangential involvement in the transaction that underlies this case. As noted above, WMA "packages" the different elements and constituents for successful television programming and content: actors, directors, producers, writers, and show concepts. Not limited to traditional

network boundaries, agents in WMA's television division actively pursue opportunities for their clients covering all commercial, broadcast networks, cable, first-run syndication and international broadcast systems, and spanning an array of programming formats. Today, many television packages represented by the William Morris Agency currently occupy key time slots on television schedules.

Judge Alex, starring the respondent here, Judge Alex E. Ferrer, and syndicated nationwide by Twentieth Century Fox was packaged by the William Morris Agency. WMA receives a "series packaging fee" for this television program, consisting of 5% of gross receipts, which is the standard commission on first run syndication. Judge Alex Ferrer was never a William Morris client, and WMA receives no commission on the salary paid to Judge Ferrer.

In his negotiations with Judge Ferrer, leading to the conclusion of the Personal Management Agreement (PMA) between Arnold Preston and Judge Ferrer of March 6, 2002, Preston represented himself as a licensed talent agent with WMA. See J.A. 8 (in fax cover letter from Ferrer to Preston, Preston is addressed at the William Morris Agency); J.A. 21 (¶ 5) (in fact, Preston was an assistant-trainee at WMA, not a licensed talent agent). Mr. Preston was never promoted from his trainee status, and subsequently was dismis sed from employment with the William Morris Agency.

3. As one of the world's leading talent agencies, the William Morris Agency has an obvious – and substantial – interest in the proper regulation of the

provision of consulting services to all sorts of talent, working in all aspects of the media and entertainment sectors. The statutory scheme at issue in this case, California's Talent Agencies Act, Cal. Labor Code § 1700 *et seq.* (hereinafter "TAA," or "the Act"), is one such approach to ensure the proper licensure and regulation of talent agencies, and to prevent unscrupulous agents from taking advantage of inexperienced, unwitting or vulnerable individuals who seek access to the challenging and demanding entertainment world. Particularly significant, in this regulatory respect, are the modalities of dispute settlement when issues arise – as they inevitably do – in the relationships between artists, their agents and managers, and media enterprises.

California Labor Code §§ 1700.44 & 1700.45, attempts to find an equilibrium between party autonomy in the conclusion of talent contracts and the necessity of government regulation over this service sector. The carefully-wrought statutory scheme protects party autonomy, evidenced by the provision of ADR mechanisms (including arbitration), but also fulfills the need for neutral administrative determinations of the qualifications of talent agents, the propriety of their form contracts, and best practices in the industry. The William Morris Agency endorsed the enactment of rules for theatrical and motion picture agents (as well as artists' managers) through California's Employment Agencies Act in 1937, and supported the TAA when it was adopted in its present form by the California legislature in 1978. WMA continues to support the TAA's operation – as through

the licensure, oversight, and adjudicative decisions of California's Labor Commissioner – to this very day.

Even more particularly, WMA submits that the TAA's provisions for the allowance of stays of arbitration (when the parties select such a dispute settlement mechanism), see Cal. Labor Code § 1700.45, as threshold questions of the Act's applicability are administratively determined, is entirely consistent with Congress's well-stated policy goal, under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, of promoting arbitration and the effective enforcement of arbitral agreements. Far from reflecting some sort of hostility to alternative dispute resolution, California's TAA strikes the right balance between the exercise of a state's legitimate police powers in regulating a service industry (including the manner in which that sector resolves disputes with its constituents), and the need for quick and final resolutions of disputes through arbitration.

STATEMENT

Petitioner and his *amici* have forcefully criticized California's Talent Agencies Act (TAA), Cal. Labor Code § 1700 *et seq.*, as somehow subversive of federal objectives of uniformity in the regulation of commerce and the promotion of arbitration, with nary an appreciation for the legislative history of this enactment and the important public policies underlying this statute. Any consideration by this Court of whether the TAA is preempted by the Federal

Arbitration Act, should at least take passing notice of the regulatory system established by California for the licensure, oversight, and disciplining of talent agents.

In 1913, California legislated an Employment Agencies Act (EAA), which, in recognition of the state's infant entertainment industry, covered "theatrical employment agencies," including "circuses, vaudeville, theatrical and other entertainers, exhibitors, and performers." 1913 Cal. Stat. 515 (ch. 282). A 1937 enactment added the category of "motion picture employment agencies," 1937 Cal. Stat. 230 (ch. 90), and a 1943 amendment augmented the statute to cover "artist managers," defined as persons who "engaged in the occupation of advising, counseling, or directing artists on the development of their professional careers and who procures, offers, or promises employments or engagements of an artist. . . ." 1943 Cal. Stat. 1326 (ch. 329). Even when the EAA was repealed in 1967, artist managers (under the Artists Managers Act) remained under the jurisdiction of the state Department of Labor.

In 1978, the California legislature adopted the Talent Agencies Act in its current form. See 1978 Cal. Stat. ch. 1382, currently codified at Cal. Labor Code § 1700 *et seq*. What had previously been known as "artist managers" were denominated as "talent agents" in the TAA. See Cal. Labor Code § 1700.4 (amended in 1982, 1982 Cal. Stat. ch. 682, to exclude application to those who advise recording artists). In 1982, a comprehensive review of the TAA was conducted by a specially-constituted Entertainment Commission, which consisted of representatives from the artist community (Ed Asner, John Forsythe, and Cicely

Tyson), the talent agency constituency (Jeffrey Berg, Roger Davis, and Richard Rosenberg), and personal managers (Bob Finkelstein, Patricia McQueeny, and Larry Thompson), under the chairmanship of the State Labor Commissioner. See Report of the California Entertainment Commission, May 23, 1985 (transmitted Dec. 2, 1985), Cal. Doc. E2035 R4 1985, at 3-4.

One major issue considered by the Entertainment Commission was whether criminal penalties should be prescribed for those who engaged in the procurement of employment for artists, without being properly licensed under the TAA. The Commission rejected this proposal, and concluded that

> existing civil remedies . . . to anyone who has been injured by the Act, are sufficient to serve the purpose of deterring violation of the Act and punishing breaches. . . . Perhaps the most effective weapon for ensuring compliance with the Act is the power of the Labor Commissioner, at a hearing on a Petition to Determine Controversy, to find that a personal manager or anyone has acted as an unlicensed talent agent and, having so found, declare the contract void from inception and order the restitution to the artist of all fees paid by the artist and the forfeiture of all expenses advanced to the artist.

Id. at 26-27. This compromise – foregoing criminal sanctions against unlicensed talent agents in favor of administrative recourse with the state Labor

Commissioner – is reflected in the TAA itself. See Cal. Labor Code § 1700.44(b).

The TAA provides a comprehensive and strict regulatory regime for talent agents, in order to ensure the welfare of the artists they represent. See *Waisbren v. Peppercorn Productions, Inc.*, 41 Cal. App.4th 246, 254, 48 Cal. Rptr.2d 437 (1995). As a condition for licensure, applicant talent agents are subject to background checks and fingerprinting. See Cal. Labor Code §§ 1700.6 & 1700.7. Agents must also post a surety bond in the amount of $50,000 in order to satisfy any obligations to their clients. See id. § 1700.15. Moneys held by an agent for a client-artist must be in trust. Id. § 1700.25. Under the Act, the Labor Commissioner must approve all form contracts between agents and artists, id. § 1700.23, agents must file their fee schedules with the Commission, id. § 1700.24, and must maintain records for inspection by the Commission. See id. § 1700.27.

The TAA has substantive provisions which prohibit an agent from issuing false, fraudulent or misleading information or advertisements, id. § 1700.32, employing clients in unsafe places, id. § 1700.33, accepting registration or referral fees, or engaging in fee-splitting with employers. See id. §§ 1700.39 & 1700.40. The Act is especially stringent as concerns the relationship between talent agents and artists who are minors. See id. §§ 1700.34, 1700.36 & 1700.37. In the event of agent misconduct, the Labor Commissioner may suspend or revoke that agent's or agency's license. See id. § 1700.21.

The TAA also recognizes an additional overlay of

control of the talent agent profession: by "bona fide labor union[s] regulating the relations of its members to a talent agency." Id. § 1700.45(b). Such franchise arrangements have been recognized in other jurisdictions. See, e.g., *Am. Fed. of Telev. & Radio Artists, AFL-CIO v. Association of Talent Agents*, 576 N.Y.S.2d 575, 576 (N.Y. App. Div. 1991).

In the provisions under dispute in this case, Cal. Labor Code §§ 1700.44 & 1700.45, controversies between agents and artists are to be submitted to the state Labor Commission. The California Supreme Court has construed this provision to mean that the Labor Commissioner has plenary authority even in disputes where a violation of the TAA is raised as a defense. See *Styne v. Stevens*, 26 Cal.4th 42, 26 P.3d 343 (2001).

In a carefully-crafted provision, the California legislature allowed for arbitration of disputes between artists and agents, Cal. Labor Code § 1700.45, provided that certain requisites were satisfied, including that the Labor Commissioner have reasonable notice of the arbitral hearings and the opportunity to attend, id. §§ 1700.45(c) & (d), and that the arbitral proceedings be conducted pursuant to California's Code of Civil Procedure. Section 1700.45 also provides that

> [i]f there is an arbitration provision in a contract, the contract need not provide that the talent agency agrees to refer any controversy between the applicant and the talent agency regarding the terms of the contract to the Labor Commissioner for adjustment, and Section 1700.44 shall

not apply to controversies pertaining to the contract.

Id. § 1700.45 (¶ 3).

SUMMARY OF ARGUMENT

A. The law selected by the parties to the underlying contract (the Personal Management Agreement (PMA)) in this case was California law, and California law was expressly applied to the conduct of any arbitral proceedings. J.A. 17-18. Under this Court's holding in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79 (1989), party autonomy is to be judicially respected, and if the parties have selected a *lex arbitrii* that allows for stays of arbitration for parallel state judicial or administrative proceedings, no preemptive radiation under the Federal Arbitration Act (FAA) incapacitates such a result. See id. at 474-75, 477, 479. So long as the application of state law does not actually frustrate an ultimate recourse to arbitration, see *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 688 (1996), anterior state administrative proceedings are permissible.

Such is the case here. California's Talent Agencies Act (TAA) affirmatively allows the arbitration of agent-artist disputes, see Cal. Labor Code § 1700.45, and provides for an administrative procedure prior to arbitration, "even if the result is that arbitration is stayed where the [Federal Arbitration] Act would otherwise permit it to go forward." *Volt*, 489 U.S. at 479. California's Labor Commissioner can make a

non-preclusive ruling that the regulatory interests of the State have been satisfied. The arbitrator in this case, in any event, has indicated that such a determination would be helpful in the disposition of the matter. J.A. 38.

In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), and predecessor cases, the Court held that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." Id. at 445-46 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967); and *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)). The PMA's arbitration provision merged any challenge of the arbitral clause with a dispute regarding the contract as a whole, including the propriety of its formation.

B. There is no inconsistency between the FAA's goal of effectuating contracts that include arbitration as the means of dispute settlement, and allowing certain administrative determinations to also take place. This is particularly so when those administrative proceedings occur prior to the conclusion of the arbitral process and the administrative determinations are non-preclusive in effect. To hold in favor of Petitioner here "would undermine the detailed enforcement scheme created by [California in the TAA and] the substantive statutory prerogative of the [Labor Commissioner] to enforce those claims for whatever relief and in whatever forum the [Labor Commissioner] sees fit[,] simply to give greater effect to an agreement between private parties" to arbitrate. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S.

279, 296 & n.10 (2002).

California's TAA shows a high degree of gracious solicitude to arbitral proceedings. If the parties in an agent-artist relationship wish to employ arbitral mechanisms to resolve their dispute, they need do nothing more than allow the Labor Commissioner to make a threshold determination under the TAA and then give the Commissioner the opportunity to participate in the arbitral proceedings. Indeed, if the requisites of Cal. Labor Code § 1700.45 are fully satisfied, and the proper notice is made pursuant to the contract, the parties can fully waive recourse to the Labor Commissioner.

C. This Court should appreciate the unique nature of the labor market for entertainment and media talent, especially in the context of weighing the application of a federal statutory scheme and its preemptive effect. See, e.g., *United States v. Shubert*, 348 U.S. 222 (1955). Markets in creative talent present unique regulatory challenges, and many states (not just California) have legislated in this field.

California courts, in construing the TAA, have elucidated the significant public policy rationale behind the dispute settlement provisions of the Act and have roundly condemned the tactics of certain agents or representatives who would seek to deny the Act's protections to their artist-clients. See *Styne v. Stevens*, 26 Cal.4th 42, 51, 26 P.3d 343, 349 (2001); *Buchwald v. Superior Court*, 254 Cal. App.2d 347, 355, 62 Cal. Rptr. 364 (1967). Petitioner's attempts to circumvent the TAA, through his audacious interpretation of his own ambiguously-drawn arbitration clause in the PMA,

should be unavailing.

California's Labor Commissioner – under the TAA as part of the applicable law selected by the contract and its arbitration provision – should be able to make an administrative determination as to Petitioner's licensure status and any potential effects it may have on the formation of the contract. No principled pursuit of congressional policy of promoting arbitration, nor any ground for preemption by the Federal Arbitration Act, counsels a different result in this case.

ARGUMENT

A careful review of the parties' agreed-to arbitration clause, in light of the policy objectives and remedial structure of California's Talent Agencies Act (TAA), should lead this Court to conclude that resort to administrative determinations, prior to (and not preclusive of) arbitration, does not offend Congress's policy of promoting the effective enforcement of arbitral agreements under the Federal Arbitration Act (FAA).

A. Principles of Party Autonomy, as Effectuated by the FAA, Dictate the Application of Administrative Procedures under California's Talent Agencies Act to Disputes Arising Under this Contract.

1. An essential policy objective of the FAA, as legislated by Congress, is to effectively enforce freely-bargained-for contracts between private parties that select arbitration as the method for resolving disputes

under those agreements. See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79 (1989) ("The FAA was designed 'to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate,' *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. [213], at 219-220 [(1985)], and to place such agreements ' "upon the same footing as other contracts," ' *Scherk v. Alberto-Culver Co.*, 417 U.S. [506], at 511 [(1974)] (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924))."); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (FAA was designed "to make arbitration agreements as enforceable as other contracts, but not more so.").

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court observed that "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." Id. at 628; see also *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 242 (1987) ("Accordingly, the McMahons, 'having made the bargain to arbitrate,' will be held to their bargain. Their RICO claim is arbitrable under the terms of the Arbitration Act.").

A key corollary to this principle of party autonomy under the FAA is that if the parties, by virtue of their contract, have selected an applicable law that includes procedures for the interaction of arbitral, administrative and judicial mechanisms for dispute settlement, these state-law procedures should be respected. This was confirmed by this Court in *Volt*,

where at issue was a construction contract that included an arbitration provision, but which also selected California law as the applicable law of the contract. See 489 U.S. at 470. Volt petitioned a California trial court to compel arbitration; Stanford sought a stay of arbitration pursuant to Cal. Civ. Proc. Code Ann. § 1281.2(c) (West 1982) (still in force), which permitted "a court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, where 'there is a possibility of conflicting rulings on a common issue of law or fact'." Id. at 471.

Volt resisted the application of a stay, under California procedural law, as being preempted under the FAA. The Court rejected this challenge, "conclud[ing] that even if §§ 3 and 4 of the FAA are fully applicable in state-court proceedings, they do not prevent application of Cal. Civ. Proc. Code Ann. § 1281.2(c) to stay arbitration where, as here, the parties have agreed to arbitrate in accordance with California law." Id. at 477. The Court elaborated on this holding by noting that

> it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are

> generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward. By permitting the courts to "rigorously enforce" such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.

Id. at 479 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). Finally, this Court concluded that the FAA did not preempt the California statute because "the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed in the manner provided for in [the parties'] agreement'." 489 U.S. at 474-75 (quoting 9 U.S.C. § 4).

2. A careful review[3] of the choice-of-law and arbitration provisions in the Personal Management Agreement (PMA) between Preston and Ferrer of March 6, 2002, J.A. 8, 17-18 (¶¶ 12 & 13), indicates that the parties intended that California's procedural law be applied to any arbitration between the parties. Paragraph 12 of the PMA provides in pertinent part that "[t]his agreement shall be governed by the laws of the state of California, applicable to agreements wholly entered into and performed herein." J.A. 17. Paragraph 13 of the PMA (denominated "Arbitration") reads in full as follows:

> In the event of any action, suit or proceeding arising from or based upon this Agreement brought by either party hereto against each other, the prevailing party shall be entitled to recover from the other attorneys['] fees in connection therewith in addition to the costs of such action, suit or proceeding. In the event of any dispute under or relating to the terms of this agreement, or the breach, validity,

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[3] This Court has been hitherto hindered in making such an examination. Preston's Petition studiously avoided quoting the arbitration clause in full, detracting from its plain meaning. See Pet. 3 (citing Pet. App. 6a) (referencing the California Court of Appeal decision, which referred to the provision as a "standard American Arbitration Association (AAA) arbitration clause." See 145 Cal. App.4th at 443). Likewise, Preston's brief fails to quote the provision fully. See Pet. Br. 3.

> or legality thereof, it is agreed that the same shall be submitted to arbitration to the American Arbitration Association in the city of Los Angeles, California, and in accordance with the rules promulgated by the said association, and judgment upon the award rendered by the arbitrator(s), may be entered into any court having jurisdiction thereof. Nothing in this agreement shall be construed to require any act contrary to any law or regulation of any guild or union. If there is any conflict between this agreement and any present or future law, the latter shall prevail, but in such an event, the provisions of such agreement shall be curtailed only to the extent necessary to bring it within the requirements of said law, rule or regulation.

J.A. 17-18 (¶ 13).

Despite Petitioner's assertion, see Pet. 3; Pet. Br. 3, and the conclusory statement of the California Court of Appeal, see 145 Cal. App.4th at 443, it is by no means clear that this is, in its entirety, a "standard American Arbitration Association (AAA) arbitration clause." See id. At least for commercial disputes arising under a contract concluded by the parties, the AAA recommended the following arbitration clause:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration

> Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes), Amended and Effective July 1, 2003, http://www.adr.org/sp.asp?id=26396#stan (last visited Dec. 5, 2007). The "standard" AAA arbitration clause thus covered "any controversy or claim" arising out of a contract, "or the breach thereof." Id. The PMA proposed by Preston, and signed by Ferrer, covered, instead, "any dispute under or relating to the terms of this agreement, or the breach, validity, or legality thereof. . . ." J.A. 18.

The additional coverage of the arbitral clause in the PMA must, however, be read in light of the particular choice-of-law provision embedded into the arbitral clause:

> If there is any conflict between this agreement and any present or future law, the latter shall prevail, but in such an event, the provisions of such agreement shall be curtailed only to the extent necessary to bring it within the requirements of said law, rule or regulation.

J.A. 18. This choice-of-law provision speaks specifically to the procedural and substantive law for the arbitration. After all, the PMA already had provided a

general choice-of-law determination. See J.A. 17 (¶ 12) ("[t]his agreement shall be governed by the laws of the state of California, applicable to agreements wholly entered into and performed herein.").

3. The parties' designation of California law as the applicable law governing any dispute settlement procedure (including recourse to arbitration), has two broad consequences for the outcome of this case, necessitating the affirmance of the decision below.

a. The first, as already suggested, is that because "where, as here, the parties have agreed to arbitrate in accordance with California law," *Volt Information Sciences*, 489 U.S. at 477, the FAA does not preempt the terms of California's Talent Agencies Act, insofar as Cal. Labor Code § 1700.45 provides for an administrative procedure anterior to arbitration, "even if the result is that arbitration is stayed where the [Federal Arbitration] Act would otherwise permit it to go forward." Id. at 479.

This Court has consistently construed its decision in *Volt* as preserving the autonomy of contract parties to select dispute settlement mechanisms which mix arbitral, administrative and judicial features. See *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003) ("Rather the relevant question here is what kind of arbitration proceeding the parties agreed to. That question does not concern a state statute or judicial procedures, cf. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-476 (1989). It concerns contract interpretation and arbitration procedures."); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514

U.S. 52, 57 (1995) ("We have previously held that the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties.") (citing *Volt*).

As this Court made clear in *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002), "[w]hile ambiguities in the language of the agreement should be resolved in favor of arbitration, *Volt*, 489 U.S., at 476, we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." Id. at 293; see id. at 293 n.9 ("We concluded [in *Volt*] that the FAA did not pre-empt the California statute because 'the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that "arbitration proceed in the manner provided for in [the parties'] agreement"'." (quoting *Volt*, 489 U.S. at 474-475 (quoting 9 U.S.C. § 4)).

Party autonomy in these situations can be preserved, and state procedural law can be applied to stay an arbitration, so long as the application of state law does not actually frustrate an ultimate recourse to arbitration. See *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) ("The state rule examined in *Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself."); *Byrd*, 470 U.S. at 219 (rejecting "the suggestion that overriding goal of the [FAA] was to promote the expeditions resolution of claims," allowing for stays of arbitral proceedings).

That is precisely the situation here. The

application of California's TAA, Cal. Labor Code § 1700.45, merely stays the arbitral proceedings, in order for the state Labor Commissioner to make a non-preclusive ruling that the regulatory interests of the State (including a determination of whether Preston is actually a properly-licensed talent agent) have been satisfied. Needless to say, this determination would be quite helpful in the disposition of the matter, as, indeed, the arbitrator indicated here. See J.A. 38 (¶ 5(ii)) ("the results of the Labor Commissioner hearing could also inform the Arbitrator as to the remedy or relief that would be just and equitable under the circumstances of this case.").

Under the terms of the contract agreed to by Preston and Ferrer,[4] California's procedural law, including TAA section 1700.45, can be applied to stay the arbitration. Such an application of state procedural law is not preempted by the Federal Arbitration Act, as per this Court's decision in *Volt*.

b. The structure and intent of the party's agreement to arbitrate also counsels an affirmance of

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[4] Significantly, the PMA's arbitration clause did *not* contain a provision opting-out of Labor Commission determinations of disputes, as required by Cal. Labor Code §§ 1700.23 & 1700.45(3) ("If there is an arbitration provision in a contract, the contract need not provide that the talent agency agrees to refer any controversy between the applicant and the talent agency regarding the terms of the contract to the Labor Commissioner for adjustment, and Section 1700.44 shall not apply to controversies pertaining to the contract.").

the decision below in light of this Court's ruling in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), and predecessor cases. In *Buckeye*, the Court held that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." Id. at 445-46 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967); and *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)); see also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

Petitioner has made much of the assertion that Ferrer has never challenged the validity of the arbitration clause itself. See Pet. Br. 6, 11. And, indeed, the court below suggested that the thrust of Ferrer's position was that the PMA was void *ab initio* because Preston was not a licensed talent agent under the TAA. See Pet. App. 3a-10a; 145 Cal. App.4th at 444. Ferrer's position, taken before the California Superior Court, and as reflected in his complaint for declaratory and injunctive relief, was rather more nuanced. See J.A. 27 (¶ 5) ("Plaintiff contends that (a) the Contract is void by reason of Defendant's attempt to procure employment for Plaintiff in violation of [the TAA], [and] (b) the Contract's arbitration clause does not vest authority in an arbitrator to determine whether the contract is void. . . .").

The peculiar structure of the PMA's arbitration clause – as drafted by Preston and dispatched to Ferrer for his emendations and approval (see J.A. 8) – essentially merges any challenge of the arbitral clause with a dispute regarding the contract as a whole,

including the propriety of its formation. After all, the arbitral clause specifically references the application of California law in this respect. J.A. 18 (¶ 13) ("If there is any conflict between this agreement [to arbitrate[5]] and any present or future law, the latter shall prevail, but in such an event, the provisions of such agreement shall be curtailed only to the extent necessary to bring it within the requirements of said law, rule or regulation.").

However the application of the California law selected by the parties is viewed – whether as governing the procedure of the dispute settlement mechanisms (including the possibility of a stay of arbitration) or as a substantive provision determining the manner of challenging the PMA's formation as a contract – the identical result is reached here. The parties have agreed to the application of the Talent Agencies Act, and under either the *Volt* precedent or the *Prima Paint-Southland-Buckeye* line of decisions, there is no preemption by the Federal Arbitration Act.

B. Recourse to State Administrative Determinations, Anterior to Arbitration, Does Not Undermine the FAA.

Petitioner and his *amici* have sought to frame this case as whether this Court's ruling in *Buckeye*

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[5] This interlineation is perfectly appropriate since the previous sentence reads, in pertinent part, "it is *agreed* that the same [the dispute] shall be submitted to arbitration. . . ." J.A. 18 (emphasis added).

Check Cashing, Inc. v. Cardegna, 546 U.S. 400 (2006), ought to be extended to situations where state law provides for an administrative procedure before arbitration. As suggested by the previous discussion, based on the peculiarities of the arbitration agreement between Preston and Ferrer, it appears that the parties actually consented to the involvement of California's Labor Commissioner, under the TAA, to make a determination of certain threshold issues under the Act. Chief among these was whether Preston was a duly-licensed talent agent, and, if not, whether the PMA (including its arbitration clause) was void *ab initio*. To the extent that the PMA – which was, after all, drafted by Preston – merged the threshold validity of the contract with the agreement to arbitrate, Petitioner should hardly be seen as now complaining of the involvement of the California Labor Commissioner in making a determination in a procedure that is required under the applicable law expressly selected by contract. See *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 248 (1995) (O'Connor, J., concurring in part) ("If the court finds the language to be ambiguous, it might invoke the familiar rule that the contract should be construed against its drafter, and thus that respondents should receive the benefit of the doubt.") (quoting 2 E. Farnsworth, FARNSWORTH ON CONTRACTS § 7.11, at 265-68 (1990)).

But, even putting aside the particular bargain made by the parties here, it is not inconsistent with the goal of the FAA in effectuating contracts that include arbitration as the means of dispute settlement, to allow certain administrative determinations to also take place. This is especially so when those administrative

proceedings occur prior to the conclusion of the arbitral process and the administrative determinations are non-preclusive in effect.

Amicus is mindful that this Court has, in other contexts, indicated that recourse to an administrative procedure does not necessarily preclude arbitration. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28-29 (1991); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 231 (1987). Both *Gilmer* and *McMahon* involved federal administrative schemes, the Age Discrimination in Employment Act (ADEA) and the Securities Exchange Act, respectively. In *Gilmer*, the Court acknowledged that administrative proceedings through the EEOC, under the ADEA, can occur in tandem with arbitration of employment disputes. See 500 U.S. at 28 ("An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action."). Likewise, in *McMahon*, this Court's concern was whether arbitration would diminish the effectiveness of section 10(b) claims under the Securities Exchange Act, and concluded it would not. See 482 U.S. at 232-33.

In its discussion in *Gilmer*, this Court generally considered the potential interplay of arbitral and administrative mechanisms:

> The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but, as noted above, claims under those statutes are appropriate for arbitration. "[S]o long as

> the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."

500 U.S. at 28 (quoting *Mitsubishi*, 473 U.S. at 637).

This holding was further clarified in this Court's decision in *Waffle House*, where it was argued that an arbitral agreement between two private parties precluded an administrative agency (in that instance, the EEOC) from seeking victim-specific relief on behalf of an aggrieved employee. See 534 U.S. at 290-96. The Court rejected this proposition and concluded that

> pursuant to Title VII and the ADA, whenever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief. To hold otherwise would undermine the detailed enforcement scheme created by Congress simply to give greater effect to an agreement between private parties that does not even contemplate the EEOC's statutory function.
>
> We have held that federal statutory claims may be the subject of arbitration agreements that are enforceable pursuant to the FAA because the agreement only determines the choice of forum. . . . To the

> extent the Court of Appeals construed an employee's agreement to submit his claims to an arbitral forum as a waiver of the substantive statutory prerogative of the EEOC to enforce those claims for whatever relief and in whatever forum the EEOC sees fit, the court obscured this crucial distinction and ran afoul of our precedent.

Id. at 296 & n.10 (citations omitted).

The combined teaching of these precedents, as relevant to this case, is that arbitral and administrative mechanisms can co-exist under a state statutory scheme without running afoul of FAA preemption. This is particularly so where, as here (but unlike in *Waffle House*), the parties did appear, in the PMA, to "contemplate the [California Labor Commissioner's] statutory function." 534 U.S. at 296. Even more importantly, administrative determinations under the TAA neither preclude subsequent arbitral proceedings (although they may stay them), and any determinations made by the Labor Commissioner are not necessarily binding on the arbitrator.

Moreover, it is important to emphasize, as noted above, *supra* at 8-10, that California's TAA was expressly designed to create a system of regulatory control over talent agents (and their relations with artist-clients) that would substitute for the imposition of *criminal* penalties for an individual acting as a talent agent without a license. See Report of the California Entertainment Commission, May 23, 1985 (transmitted Dec. 2, 1985), Cal. Doc. E2035 R4 1985, at 26-27 ("existing civil remedies . . . to anyone who has been

injured by the Act, are sufficient to serve the purpose of deterring violation of the Act and punishing breaches. . . . "); see also Cal. Labor Code § 1700.44(b); *Yoo v. Robi*, 126 Cal. App.4th 1089, 1104, 24 Cal. Rptr.3d 740, 750 (2005); *Waisbren*, 41 Cal. App.4th at 262, 48 Cal. Rptr. at 437. To hold in favor of Petitioner here "would undermine the detailed enforcement scheme created by [California in the TAA and] the substantive statutory prerogative of the [Labor Commissioner] to enforce those claims for whatever relief and in whatever forum the [Labor Commissioner] sees fit[,] simply to give greater effect to an agreement between private parties" to arbitrate. *Waffle House*, 534 U.S. at 296 & n.10.

Petitioners and his *amici*'s arguments mischaracterize the nature of administrative proceedings under the TAA, and should be unavailing. It is true that a determination made by the Labor Commissioner under the TAA is subject to judicial review *de novo*. See Cal. Labor Code § 1700.44(a). Ironically enough, this provision was included for the protection of talent agents (putative or real), such as Preston, in the event the Labor Commissioner entered a determination that was unfavorable to their interests. See id. (providing for the posting of an appeal bond "not exceeding twice the amount of the judgment," on the assumption that judgments would be rendered against talent agents in favor of client-artists). But such judicial review, even assuming it is initiated by either of the parties here, would not necessarily be preclusive on the decision of the arbitrator.

Likewise, there is no suggestion that the TAA has been construed as erecting an impermissible

impediment or bar to arbitration in cases such as this. Insofar as the TAA establishes an exhaustion of administrative remedies requirement, such is equally applied to judicial and arbitral proceedings. The California Supreme Court made clear in *Styne v. Stevens*, 26 Cal.4th 42, 26 P.3d 343 (2001), that a pending case in state superior court must be stayed in favor of Labor Commissioner determinations under the TAA, even if a TAA violation is raised as a defense in the judicial proceeding. See id. at 54-55, 26 P.3d at 351-52. There is no intelligible reason that a different result should apply in an instance where the parties have selected arbitration as the means of dispute settlement.

In short, far from exhibiting some hostility or animus to arbitration in disputes between artists and their agents, the TAA shows a high degree of deference to arbitral proceedings. The provisions of Cal. Labor Code § 1700.45 are by no means difficult to satisfy if the parties wish to employ arbitral mechanisms to resolve their dispute. Assuming there is even a "controversy" under the Act to resolve, see id. § 1700.44(a), the Act's provisions demand nothing more than allowing the Labor Commissioner to make a non-preclusive finding under the TAA, and then giving the Commissioner the opportunity to participate in the arbitral proceedings. Indeed, if the requisites of section 1700.45 are fully satisfied, and the proper notice made under the contract is made, the parties can fully waive recourse to the Labor Commissioner. See id. ("If there is an arbitration provision in a contract, the contract need not provide that the talent agency agrees to refer any controversy between the applicant and the talent agency regarding the terms of the contract to the Labor Commissioner for

adjustment, and Section 1700.44 shall not apply to controversies pertaining to the contract.").

The hard truth of this case is that Mr. Preston drew-up the PMA in a form that had never been approved by the Labor Commissioner, under Cal. Labor Code § 1700.23. He had the opportunity to draft an arbitration clause that, at once, fully complied with section 1700.45 and clearly expressed the intent of the parties to waive recourse to the Labor Commissioner. Instead, he drafted a clause that incorporated *sub silentio* the TAA as part of the law governing the arbitral procedure, hoping this would satisfy the reasonable, opt-out and notice requirements of section 1700.45. This "constructive ambiguity" – if that is what it can charitably be described as – should not redound to Preston's benefit here. That Preston seeks to avoid a potential administrative determination by the Labor Commissioner that he was not a licensed talent agent under the TAA, and thus that the opt-put provisions for arbitration under section 1700.45 could never apply, may be deeply embarrassing to him. That Preston might be hung figuratively on the petard of his own defective drafting in the PMA should be of no moment to this Court. In any event, the operation of the TAA in this fashion hardly rises to the level of an impediment to a federal policy favoring the preemptive effect of the FAA in this case.

C. California's TAA Regulates a Unique Labor Market for Entertainment and Media Talent, and its Arbitral Provisions Should Not be Preempted by the FAA.

Amicus is mindful that this Court has hitherto indicated that the vindication of significant social policies, whether in federal or state law or actuated by judicial or administrative review, is not a ground to avoid the FAA's preemptive effect or to invalidate the use of arbitration in resolving disputes. See *Green Tree*, 531 U.S. at 90 ("These cases demonstrate that even claims arising under a statute designed to further important social policies may be arbitrated because '"so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,"' the statute serves its functions.") (quoting *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi*, 473 U.S. at 637))).

Nevertheless, it may be helpful for this Court to fully appreciate the unique nature of the labor market for entertainment and talent media, especially in the context of weighing the application of a federal statutory scheme and its preemptive effect. See, e.g., *Columbia Artists Management, Inc. v. United States*, 381 U.S. 348 (1965) (per curiam) (booking and managing of concert artists); *United States v. Shubert*, 348 U.S. 222 (1955); *Hart v. B. F. Keith Vaudeville Exchange*, 262 U.S. 271 (1923), on remand, 12 F.2d 341 (2d Cir. 1926), cert. denied, 273 U.S. 703 (1926) (application of the Sherman Act to vaudeville and theatrical productions).

It has been well-documented in economic, sociological, and industrial relations literature that

markets in creative talent present unique regulatory challenges. See William J. Baumol & William G. Bowen, PERFORMING ARTS: THE ECONOMIC DILEMMA (1966); Richard E. Caves, GETTING OUR ACT TOGETHER: THE ECONOMIC ORGANIZATION OF CREATIVE INDUSTRIES (2000); Pierre-Michel Menger, *Artistic Labor Markets and Careers*, 25 ANN. REV. SOCIOLOGY 541 (1999). This has been particularly observed in the motion picture and television production industries. See Darlene C. Chisholm, *Profit-Sharing versus Fixed-Payment Contracts: Evidence from the Motion Pictures Industry*, 13 J. L., ECON. & ORGANIZATION 169 (1997); Alan Paul & Archie Kleingartner, *Flexible Production and the Tranformation of Industrial Relations in the Motion Picture and Television Industry*, 47 INDUSTRIAL & LABOR RELATIONS REV. 663 (1994); Susan Christop'erson & Michael Storper, *The Effects of Flexible Specialization of Industrial Politics and the Labor Market: The Motion Picture Industry*, 42 id. 331 (1989). Talent agents and artist managers are key players in the process of connecting artists with content producers. See Michael Cieply, *Tilting Hollywood's Balance of Power to Talent Agency Clients*, N.Y. TIMES, March 19, 2007, at C1; William T. Bielby & Denise D. Bielby, *Organizational Mediation of Project-Based Labor Markets: Talent Agencies and the Careers of Screenwriters*, 64 AM. SOCIOLOGICAL REV. 64 (1999).

It is for these reasons that the profession of talent agents and the practice of procuring employment for artist-clients have been subject to regulation in many states, and not just California. See, e.g., Ariz. Rev. Stat. § 23-521(A) (2007); Ariz. Admin. Code R20-5-328 (2007)

(subjecting talent agents, within certain definitions, to regulation as an employment agency); Fla. Stat. Ann. § 468.415 (2007) (sexual misconduct in the operation of a talent agency); La. Rev. Stat. Ann. § 23:251(B) (2007) (employment of minors by talent agencies); N.Y. Arts & Cult. Aff. Law § 37.07(1) (McKinney 2007) (advertising limits for talent agents and artist managers). Where talent agent regulation through arbitral processes has been an issue, it has been ruled that the arbitrability of such disputes must be decided by courts in light of the parties' agreement and the context of state law. See *Am. Fed. of Telev. & Radio Artists, AFL-CIO v. Association of Talent Agents*, 576 N.Y.S.2d 575, 576 (N.Y. App. Div. 1991).

California courts, in construing the TAA, have elucidated the significant public policy rationale behind the dispute settlement provisions of the Act and have roundly condemned the tactics of certain agents or representatives who would seek to deny the Act's protections to their artist-clients. In *Buchwald v. Superior Court*, 254 Cal. App.2d 347, 62 Cal. Rptr. 364 (1967), a case decided under the old Artist Managers Act, but with substantially the same operative provisions as the TAA, the court held that the statute applied to a contract even if its terms appeared to disclaim that services for the procurement of creative employment were being provided. See id. at 355, 62 Cal. Rptr. at 370 ("Clearly the Act may not be circumvented by allowing the language of the written contract to control [otherwise] [t]he form of the transaction, rather than its substance would control.").

As another California court has held:

> [t]he rationale for denying a personal manager recovery even for activities which were entirely legal is based on the public policy of the Act to deter personal managers from engaging in illegal activities. Knowing they will receive no help from the courts in recovering for their legal activities, managers are less likely to enter into illegal arrangements. In *Waisbren*, the court observed one reason the Legislature did not enact criminal penalties for violation of the Act was "because 'the most effective weapon for assuring compliance with the Act is the power . . . to declare any contract entered into between the parties void from the inception.' "

Yoo, 126 Cal. App.4th at 1103-04, 24 Cal. Rptr.3d at 749-50 (quoting *Waisbren*, 41 Cal. App.4th at 262 (quoting from the 1985 California Entertainment Commission report)). This policy rationale and remedial structure of the TAA has been confirmed by the California Supreme Court. See *Styne*, 26 Cal.4th at 51, 26 P.3d at 349 ("In furtherance of the Act's protective aims, an unlicensed person's contract with an artist to provide the services of a talent agent is illegal and void.") (citing *Waisbren* and *Buchwald*).

Petitioner's attempts to "circumvent" the TAA, *Buchwald*, 254 Cal. App.2d 347, 62 Cal. Rptr. 364, through his creative interpretation of his own ambiguously-drawn arbitration clause in the PMA, should be unavailing. If, in fact, he was unlicensed as

a talent agent at the time of the execution of the PMA, its terms (including the arbitration clause) are void *ab initio*.

Obviously, the arbitrator is free to reach whatever conclusions he can on this point. Preston is not at liberty, however, to circumvent the authority of California's Labor Commissioner – under the TAA as part of the applicable law selected by the contract and its arbitration provision – to make an administrative determination as to Preston's licensure status and any potential effects it may have on the formation of the contract. And, indeed, the arbitrator has expressed his interest in such a determination. See J.A. 38 (¶ 5(ii)) ("the results of the Labor Commissioner hearing could also inform the Arbitrator as to the remedy or relief that would be just and equitable under the circumstances of this case."). No principled pursuit of Congress's policy of promoting arbitration, nor any ground for preemption by the Federal Arbitration Act, counsels a different result in this case.

CONCLUSION

The decision of the California court of appeal should be affirmed.

Respectfully submitted,

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